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# "The Birth of Death": Stillborn Birth Certificates and the Problem for Law

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“The Birth of Death”: Stillborn Birth Certificates  
and the Problem for Law

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Forthcoming 100 Cal. L. Rev. February 2012

# California Law Review

## *“The Birth of Death”: Stillborn Birth Certificates and the Problem for Law*

Forthcoming, 100 Cal. L. Rev. (February 2012)

Carol Sanger<sup>1</sup>

Queen Victoria [of Spain] was delivered of an infant Prince stillborn at 4 o'clock this morning. The body will be buried without ceremony in the royal pantheon at the Escorial Monastery. When told of her loss, the mother wept....*Victoria's Son Stillborn, New York Times, May 22, 1910.*

### I. INTRODUCTION

The delivery of a stillborn child is a confounding event. Stillbirth is a devastating obstetric outcome—a reproductive moment that at once combines birth and death. The term ‘stillborn’ refers to a child who ‘issues forth’ from its mother after 24 weeks of pregnancy but who has died in utero.<sup>2</sup> In other languages this juxtaposition of life and death is met head-on: the child is not stillborn but born dead: *nacido muerto, totgeboren,*

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<sup>1</sup> Many thanks to, Beth Povinelli, Caroline Mala Corbin, Jeremy Waldron, and to participants at faculty workshops at the University of Cincinnati College of Law, Columbia Law School, and the Institute for Research on Women and Gender at Columbia University. I also thank Columbia Law School students Jenny Ma ('11), Carrie LeBirge ('10), and Lily Bass-Marshall ('09) for excellent discussion and research.

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<sup>2</sup> World Health Organization, Stillbirth Definition, *available at* <http://www.nhs.uk/conditions/Stillbirth/Pages/Definition.aspx>. (Under the World Health Organization and in most of the United States, the minimum gestational period is 20 weeks); *see also* Robert N. Silver et al, *Work-up of Stillbirth: A Review of the Evidence*, AMERICAN JOURNAL OF OBSTET. & GYN. 433-444 (May, 2007).

or *mort-ne*. In English the softer term is used. It seems to suggest that the newborn may simply be still and that there is yet time to discern whether or not it is dead.

Of course, many women who deliver stillborn children today, at least under systems of advanced health care, know before labor begins that the baby is already dead and they deliver with this knowledge. In such cases, birth is a grim experience as the traditional expectations of a newborn's cry are met instead with silence.<sup>3</sup> Stillbirth is, as poet Seamus Heaney has written, "the birth of death."<sup>4</sup>

This Article discusses the complications of this simultaneity—the birth of death—as a social experience and as a matter of law. To be sure, for most of western history, stillbirth hasn't counted for much on either score.<sup>5</sup> The birth of a stillborn child was regarded as an event of little official moment and to which traditional mourning practices rarely attached. A baby was either born alive—and thereby a person for purposes of family lineage and descent—or it was not.<sup>6</sup> Over time, however, stillbirth has become a more noteworthy phenomenon, increasingly recognized as a fitting occasion for the expression of grief and for the ceremonial solemnity that attends any other death.

Law's relation to stillbirth has also changed over time. Early legal concerns were largely criminological: might an unmarried woman's claim of stillbirth be masking an infanticide? In the late 19th century, demographic interests also emerged, as the state's interest in the identity and well-being of its citizens, particularly its children, took firmer

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<sup>3</sup> Otti Trulsson and Ingela Radestad, *The Silent Child—Mothers' Experiences Before, During, and After Stillbirth*, 31 BIRTH 189, 192 (2004).

<sup>4</sup> Seamus Heaney, *Elegy for a Still-Born Child*, in CHILDREN REMEMBERED: RESPONSES TO UNTIMELY DEATH IN THE PAST, 66 (Robert Woods, ed., 2007).

<sup>5</sup> At other historical moments, depending on the rank of the infant and conceptions of the afterlife, stillborn infants have been given full burial dignities. C.A. Hellier and R.C. Connolly, *A Re-assessment of the Larger Fetus Found in Tutankhamen's Tomb*, 83 ANTIQUITY 165 (2009).

<sup>6</sup> Edward Higgs, *A Cuckoo in the Nest? The Origins of Civil Registration and State Medical Statistics in England and Wales*, 11 CONTINUITY AND CHANGE 115-134 (1996).

hold. Public health concerns regarding infant mortality drew attention to stillbirth, which by the mid-20<sup>th</sup> century had been formally recognized as a discrete category of death, recorded among other vital statistics collected by the state.

Criminological, demographic, and public health interests in stillbirth continue. Stillbirth remains a common defense in modern infanticide prosecutions, and there are on-going efforts to improve stillbirth data collection, particularly in developing countries. But in addition to these traditional concerns, in the last decade the law has also taken a novel and somewhat therapeutic turn. In response to lobbying efforts by bereaved parents dissatisfied with the issuance of a stillborn *death* certificate, well over half the states have begun to issue stillborn *birth* certificates under newly enacted ‘Missing Angel Acts.’ These are laws that authorize parents to request and require the state to issue a birth certificate for a stillborn child. The certificates do not replace but are issued in addition to fetal death certificates, which remain compulsory. Arizona passed the first such statute in 2001 and 26 states have since followed suit.<sup>7</sup>

Missing Angel Acts raise a set of perplexing questions about the meaning and status of stillbirth as a social matter, as the subject of legal regulation, and about the interplay between the two. How is it that a child who never taken a breath has come to be understood as the proper subject for a birth certificate in early 21<sup>st</sup> century America? Why has the movement toward greater recognition of stillborns focused specially on the documentation of birth? And what is the relationship between private or familial responses to stillbirth and public or state responses? The two are surely related, for as we

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<sup>7</sup> For a complete list, visit [http://www.missingangelsbill.org/index.php?option=com\\_content&view=article&id=76&Itemid=61](http://www.missingangelsbill.org/index.php?option=com_content&view=article&id=76&Itemid=61), (as of February 22, 2011, 28 states have enacted Missing Angels Acts.) Some of the states have also named the statutes for the stillborn baby whose parents lobbied for the legislation; *see e.g.* Florida’s Katherine’s Law, [http://www.doh.state.fl.us/planning\\_eval/vital\\_statistics/Birth\\_Stillbirth.html](http://www.doh.state.fl.us/planning_eval/vital_statistics/Birth_Stillbirth.html).

shall see, the transformation of stillborn infants into accepted subjects of private mourning is what has led to the demand that they also count in the official record, and not merely for statistical purposes, but as beings worthy of individual recognition through that traditional marker of arrival—the birth certificate.

In this Article, I want to uncover and to parse some of the complexities in the relationship between private grief and public recognition in the case of stillbirth. To locate the subject generally within the structures of law and family, I begin with a brief history of the social and legal practices around stillbirth. I trace how over time stillbirth has become a category for both affective concern and public recognition. I then look at how Missing Angel Acts came into being: their background in public advocacy and how the legislation was developed, drafted, and advanced.

More significantly, the widespread enactment of Missing Angel Acts prompts a prior and more philosophical question. How is it that authorizing birth certificates for children who have never lived has come to seem a reasonable rather than an eccentric legislative gesture? Part of the answer is surely compassion toward grieving parents, a compassion that originates, at least in part, from shared understandings about the baby-like status of a stillborn infant. These understandings derive in turn from now familiar attitudes in the United States regarding the vitality and personability of the fetus. Many readers will be familiar with the idea that, in wanted pregnancies, social birth now frequently precedes biological birth.<sup>8</sup>

With this sequential phenomenon in mind, how should we think about stillborn birth certificates? What does the certificate mean? One possibility is to consider the

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<sup>8</sup> See e.g., Carol Sanger, *Seeing and Believing: Mandatory Ultrasound and the Path to a Protected Choice*, 56 U.C.L.A. L. REV. 351, 372 (2008).

certificates as something like a posthumous change in status, bracketing for now the question of whether one who has not lived can receive something posthumously. This characterization may clarify just what it is that parents seek from this form of documentation as well as the apparent ability of the law to provide special consolation in these circumstances.

Yet accepting that Missing Angel Acts may provide meaning and solace for grieving parents may not tell us quite enough. For whatever the merits of the legislation, there is also something unsettling upon first hearing about birth certificates for stillborn children. The sympathetic response may simply be to acquiesce and accept Missing Angel Acts as somewhat peculiar, but at core essentially harmless and possibly beneficial. But before we do that, it is surely worth investigating the origins or causes of our instinctive uneasiness.

Doing so is not easy. Putting anything into the balance against the exigencies of parental grief may suggest a cold indifference to suffering. That is not the case here. I proceed in my analysis ever mindful of the utter calamity of stillbirth for the parents of a stillborn child. It is, as novelist Elizabeth McCracken states in her generous memoir of stillbirth, “the worst thing in the world.”<sup>9</sup> There is then immediate recognition and immense sympathy for this loss and for the desire of some grieving parents to have their baby’s existence acknowledged through the mechanism of a birth certificate. At the same time, a birth certificate is an official document that carries the imprimatur of the state. It is therefore important to understand just what is being certified by the state in the name of the larger community when a stillborn birth certificate is issued, and what the implications of this empathic use of law may be.

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<sup>9</sup> ELIZABETH MCCRACKEN, *AN EXACT REPLICA OF A FIGMENT OF MY IMAGINATION* (2008).

I begin with four specific concerns. The first concerns the nature of a stillborn birth certificate. What exactly does it certify? To what extent might stillborn birth certificates be rightly regarded as a form of legal fiction? To answer these questions, I want to look at other instances where a person's status is adjusted after death or where a birth certificate are used to capture social, rather than biological reality. The second concern regards the therapeutic use of law in the context of stillbirth. Should the law be used to make grieving citizens *feel* better or are such gestures toward law's affective potential a misstep? And *if* so, what is the nature of the harm, in light of the declared benefit of the certificates? To think this through, I compare stillborn birth certificates with another legal intervention aimed at providing solace, victim impact statements offered up at trial by the families of murder victims. The third concern is the matter of what I call "compulsory reproductive mourning." What are the prescriptive implications of issuing stillborn certificates? Now that official provision for their issuance has been made, is the state implicitly endorsing one, intensely personal response to this form of familial tragedy and discrediting others? Finally, stillborn birth certificates raise questions about demographic integrity that must be addressed. What are their implications for population figures, for mortality statistics, and for other key demographic indicia?

A fifth concern may already have occurred to readers. This is the connection between stillborn birth certificates and the regulation of abortion. To many, the two issues seem obviously and perhaps inevitably linked. Indeed, I am one of the many. In a political culture where great effort has gone into securing attributes of personhood for fetuses, stillborn birth certificates may seem like just the latest legislative innovation

equating unborn life with born life as part of the ongoing campaign against legal abortion. Despite the compelling appeals by parents, one cannot help but notice the implications of Missing Angel Acts for how we think about other forms of fetal death.

At the same time, concerns about abortion should not overwhelm an analysis of Missing Angels Acts. The statutes have much to say about the nature and purpose of modern identity documentation, about the affective authority of law, and about the relation between private and public responses to death. I want therefore to consider the significance of these matters in their own right, putting the matter of abortion to the side. Only then will I return to connections between stillborn birth certificates and the political culture that now surrounds the issue of abortion. I want to look particularly at the work done by the rhetoric of *birth*. Investigating law's relationship to social practices in the difficult circumstances of stillbirth sheds some light on how the word "birth" is signified, socially, politically, and legally in the twenty-first century, and what the effects of this new category of recognition might be.

## II. STILLBORN MOURNING PRACTICES OVER TIME

Until the late 19th century, the natural death of infants and small children (and, it should be remembered, the death of their mothers in childbirth) was a regular feature of family life. "Nothing is more common with Infants than to die on the day of their Nativity...and even to perish before their Nativity in the hidden World of the Womb."<sup>10</sup> Acknowledging the long-standing debate in the history of childhood over whether in periods of high infant mortality parents grieved such deaths, Philip Aries' "parental

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<sup>10</sup> RAYMOND A. ANSELMANT, *THE REALMS OF APOLLO: LITERATURE AND HEALING IN SEVENTEENTH-CENTURY ENGLAND* (quoting physician and treatise writer Thomas Browne, 1679) at 49 (Associated University Presses, 1995).

indifferent theory,” the historical record seems clear that at least some parents did.<sup>11</sup>

Beginning in the 17<sup>th</sup> century, dead and stillborn infants were memorialized in portraits and in poems,<sup>12</sup> and mourned in private letters and devotionals.<sup>13</sup> Their effigies were found on tombs of women who died in childbirth, often represented as a swaddled baby in its mother’s arms.<sup>14</sup>

Of course, not all parents mourned, memorialized, or perhaps even missed their stillborn children, and those did, did not always do so in the same way. Depending on region, religion, and on wealth, a hierarchy of rites and responses emerged. In pre-Reformation England and Ireland, for example, stillborn children, because unbaptised, were denied burial in hallowed ground and were instead buried in special plots with other

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<sup>11</sup> Philippe Aries, *CENTURIES OF CHILDHOOD* (1973) (“People could not allow themselves to become too attached to something that was regarded as a probable loss.”) p. 37. See also LAWRENCE STONE, *THE FAMILY: SEX AND MARRIAGE IN ENGLAND, 1500-1800* (1977) (“There is no evidence, for example, of the purchase of mourning—not even an armband—on the death of very small children in the sixteenth, seventeenth and early eighteenth centuries, nor of parental attendance at the funeral.”) p. 105-106. Aries’ parental indifference theory has been much disputed. Drawing from the diaries of parents in England and American, historian Linda Pollack concludes that there is “no support at all for the argument that parents before the 18<sup>th</sup> century were indifferent to the death of their young offspring, whereas after the 18<sup>th</sup> century they grieved deeply. Linda Pollack, *FORGOTTEN CHILDREN: PARENT-CHILD RELATIONS FROM 1500-1900* (1983) 141-42.

<sup>12</sup> On painting, see Rosemary Mander and Rosalind K. Marshall, *An Historical Analysis of the Role of Paintings and Photographs in Comforting Bereaved Parents*, 19 *MIDWIFERY* 230-242 (2003) (discussing 17<sup>th</sup> century depictions of stillborn children in Holland); see also *The Effigy of Elizabeth Coke and her stillborn infant, 1627*; John Souch, *The Aston Family, 1635*. On poetry, see THOMAS PHILIPOTT’S *ON A GENTLEWOMAN DYING IN CHILD-BED OF AN ABORTIVE DAUGHTER*.

Here was a sad mysterie  
Work’d up it selfe, both Life and Death, we see,  
Were Inmates in one house, making the womb,  
At once become a Birthplace and a Tomb?

P. 141 in *Woods Children Remembered*.

<sup>13</sup> PRIVATE LETTERS SOURCES.

<sup>14</sup> Judith W. Hurtig, *Death in Childbirth: Seventeenth-Century English Tombs and Their Place in Contemporary Thought*, *THE ART BULLETIN*, Vol. 65, No. 4 (Dec., 1983), pp. 603-15. Nicholas Penny, *English Church Monuments to Women Who Died in Childbed between 1780 and 1835.* ENGLISH CHURCH MONUMENTS TO WOMEN WHO DIED IN CHILDBED BETWEEN 1780 AND 1835

Author(s): N. B. Penny Source: *Journal of the Warburg and Courtauld Institutes*, Vol. 38 (1975), pp. 314, 315 (noting that in this period, dying in childbirth was “common enough to be a matter of universal anxiety and at the same time rare enough to be tragic.” See specially Penny’s depiction of the elaborate monuments to Princess Charlotte and her stillborn son. pp. 326-330.

unbaptized, mostly illegitimate, children.<sup>15</sup> In the xxxx, midwives often disposed of the bodies, “discretely, but without ceremony;” undertakers and even doctors later took on the task.<sup>16</sup> In the United States too, stillborn children seem to have been segregated in death: a 1907 Washington case refers to a special lot “used for the burial of stillborn children.”<sup>17</sup>

By the early 20th century, stillborn children in Ireland and England were sometimes buried in the family plot, but typically received no funeral.<sup>18</sup> An Irish mother recalled a stillbirth in the 1940s, “You never named it or nothing. The man that looked after the graves just came and took it and buried it and there was a wee plot in the graveyard.”<sup>19</sup> Loss was often measured in terms of life’s other vicissitudes. As another Irish woman explained, “Times were hard then and you didn’t think so much about it.”<sup>20</sup> Yet there is also Queen Victoria of Spain, who, as others mothers surely did, “wept when told of her loss.”

As these examples suggest, stillborn children were sometimes the subject of intense, though mostly private sorrow. Although maternal grief over a stillborn death occasionally made its way into the public arena—a story now and then in a woman’s magazine—the dominant attitude throughout most of the twentieth century was that

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<sup>15</sup> Woods, Rosanne Cecil, *Memories of Pregnancy Loss: Recollections of Elderly Women in Northern Ireland*; In the United States too, stillborn children seem to have been segregated in death; a 1907 Washington case refers to a special lot “used for the burial of stillborn children.” *Wright v. Beardsley*, 89 P. 172, (Washington, 1907) (damages awarded to parents for improper burial of a deceased child who had been buried in a shallow grave in the stillborn lot).

<sup>16</sup> Wood at 59.

<sup>17</sup> *Wright v. Beardsley*, 89 P. 172, (Washington, 1907)(damages awarded to parents for improper burial of a deceased child who had been buried in a shallow grave in the stillborn lot).

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<sup>19</sup> Rosanne Cecil, *Memories of Pregnancy Loss: Recollections of Elderly Women in Northern Ireland*.

<sup>20</sup> *Id.* at 189.; also father example.

stillbirth was an event that had best go unspoken.<sup>21</sup> There are several explanations for this. As death itself became increasingly removed from family life—people now died in hospitals rather than at home—mourning, once “a normal part of the public life of most adults,” became more private. As historian Jay Ruby has observed, death was no longer a topic of polite conversation.<sup>22</sup> Philip Aries also identified as a cultural “interdiction on death,” the moral duty that people in the 20<sup>th</sup> century took on “to contribute to the collective happiness... by appearing to be always happy, even if in the depths of despair.”<sup>23</sup> Emerging psychological theories questioned whether mourning was perhaps pathological, rather than appropriate, as the idea of “closure” made its way into public sensibilities.

In addition, over the course of the twentieth century, stillborn death came to represent a particular failure for *women* and this too has contributed to the silence around it. As anthropologist Linda Layne has explained, producing a baby distinctively signaled the successful transition to womanhood, at least for married women.<sup>24</sup> Stillbirth (and miscarriage or infertility) disrupted this “narrative of linear progress.”<sup>25</sup> It had become an embarrassment rather than a tragedy. Indeed, as medical obstetric care became increasingly sophisticated, there was less and less excuse for failing, and a miasma of shame and isolation silence fell upon women who weren’t quite able to make it to

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<sup>21</sup> See Wendy Simonds, *Confessions of Loss: Maternal Grief in True Story, 1920-1985*, in *MOTHERS AND MOTHERHOOD* 111 (Rima D. Apple & Janet Golden, eds., 1997). See also Wendy Simonds and Barbara Katz Rothman, *CENTURIES OF SOLACE: EXPRESSIONS OF MATERNAL GRIEF IN POPULAR LITERATURE* (1992).

<sup>22</sup> Ruby, Jay, *SECURE THE SHADOW: DEATH AND PHOTOGRAPHY IN AMERICA*, (MIT Press, 1995) (noting that cemeteries were once places for public strolling)

<sup>23</sup> Aries at 93-94.

<sup>24</sup> See generally, LAYNE, LINDA, *MOTHERHOOD LOST*, (Taylor and Francis, 2001), 59.

<sup>25</sup> *Id.*

motherhood.<sup>26</sup> The particular liminality of stillborn life and the question of just what, if anything, had been lost, further qualified grieving this particular loss.<sup>27</sup> All of this contributed to what Layne identifies as “a deep-seated cultural taboo concerning pregnancy loss.”<sup>28</sup> To the extent condolences were offered following a stillbirth, they tended to downplay the significance of the death; women were to be cheered up by the reminder that all in all it was lucky they hadn’t gotten to know the dead baby any better or their loss would have been much worse.

As we shall see, only in the mid-1980s did the silence and maternal solitude around stillbirth begin to crack, as familiarity with and affection for fetal life during pregnancy transformed practices and attitudes toward stillborn death.

## STILLBIRTH IN LAW

The law’s early concern with stillbirth had little to do with mourning but rather with the detection of crime. Stillbirth was a common defense in infanticide prosecutions. Had the infant in fact been born dead, as its unwed mother or her family insisted, or had it instead been killed after its birth in order to protect the woman’s honor and livelihood?<sup>29</sup> In such cases, crude tests such as floating a bit of the baby’s lung in water were devised to assess whether the infant had ever drawn breath. To be sure, because unwed mothers

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<sup>26</sup> *Id.*

<sup>27</sup> Anthropologist Rosanne Cecil explains that the social impact of pregnancy loss is necessarily complicated: “It does not result in the creation of a new person who is to be incorporated into society, neither is it the loss of one who has been a recognized part of the existing social order.” ROSANNE CECIL, INTRODUCTION: AN INSIGNIFICANT EVENT? LITERARY AND ANTHROPOLOGICAL PERSPECTIVES ON PREGNANCY LOSS, IN *THE ANTHROPOLOGY OF PREGNANCY LOSS* (Rosanne Cecil, ed., XXXX) at 1.

<sup>28</sup> Layne, Linda, *He Was a Real Baby with Baby Things*, 5 *J. OF MATERIAL CULTURE*, 321, 322 (2000). I acknowledge the objection by stillbirth parents to include stillbirth within the term “pregnancy loss;” their argument is precisely that they lost a child, not a pregnancy.

<sup>29</sup> On the history of infanticide after illegitimacy became a matter of sin, see DAVID L. RANSEL, *MOTHERS OF MISERY: CHILD ABANDONMENT IN RUSSIA* (1988). PETER C. HOFFER AND N.E.H. HULL, *MURDERING MOTHERS: INFANTICIDE IN ENGLAND AND NEW ENGLAND: 1558-1803* (1981); see also JOSEPHINE McDONAGH, *CHILD MURDER AND BRITISH CULTURE, 1720-1900* (2003).

often concealed their pregnancies and delivered alone and in secret, some illegitimate newborns may well have been born dead;<sup>30</sup> there is still a strong correlation between the incidence of stillbirth and unattended labor.<sup>31</sup> Medical testimony over whether or not a newborn was born alive remains crucial.<sup>32</sup>

A second legal concern was demographic. As historians of vital statistics have explained, the state has many interests in knowing the size, sex, and location of its population. Planning for armies, constructing schools, and drawing boundaries for political representation all depend on reliable data about births and deaths.<sup>33</sup> In addition, public health concerns over infant birth and childhood mortality (including knowing which babies were born in order to vaccinate them) led in 1874 to the compulsory registration of births and deaths in England and Wales.<sup>34</sup>

Yet stillbirths were excluded from these counts. Neither here nor there in terms of life and death, stillborn babies were not legal persons for purposes of recording lines of descent, and were therefore of little interest in the official record.<sup>35</sup> As stated by one opponent of stillbirth registration, “Why encumber either a birth register, a death register,

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<sup>30</sup> For example, at least fifteen percent of the dead infants autopsied in post-bellum Richmond, Virginia were found to have been stillbirths. Elna C. Green, *Infanticide and Infant Abandonment in the New South: Richmond, Virginia, 1865-1915*, 24 J. OF FAMILY HISTORY 187-210 (1999).

<sup>31</sup> E.M. McClurea, R.L. Goldenberg and C.M. Banna, *Maternal Mortality, Stillbirth and Measures of Obstetric Care in Developing and Developed Countries*, 96 INT.'L J.OF GYN. & OBST. 139-146 (2007).

<sup>31</sup> See *People v. Ehlert*, 811 N.E. 2d 620 (Ill., 2004) (mother's conviction reversed because state had not proven unequivocally newborn born alive).

<sup>33</sup> See EDWARD HIGGS, *THE INFORMATION STATE IN ENGLAND: THE CENTRAL COLLECTION OF INFORMATION ON CITIZENS SINCE 1500* (2004).

<sup>34</sup> In the United States, the impetus for birth registration was similarly driven by Progressive Era reformists concerned about children's well-being. CITATION NEEDED

<sup>35</sup> E. Higgs, *A Cuckoo in the Nest?: The Origins of Civil Registration and States Medical Statistics in England and Wales*, 11 CONTINUITY AND CHANGE 115-34 (1996).

or even a special register with useless detail?”<sup>36</sup> There were also social considerations. Unlike burial for infants who died after their birth, medical certification of the cause of death was not required in cases of stillbirth. Stillborn infants could therefore be disposed of cheaply, without fuss, and in secret.<sup>37</sup> This more casual arrangement was thought to protect poor or unwed mothers from unnecessary shame and from accusations of criminality. Indeed, in 1866, the Registrar General in England opposed the compulsory inclusion of stillbirths on the grounds that “to investigate every miscarriage and every abortion and the exact time of conception and the precise period of gestation appears to me an indelicate, indecent, nasty inquiry.”<sup>38</sup>

Nonetheless, physicians and public health officials continued to insist that the invisibility of stillbirths in the public record compromised the data necessary to understand and to prevent maternal and infant mortality.” Similar concerns arose and were debated in the U.S., as one physician wrote in the *American Journal of Public Health* in 1915, “The greatest public good derived from the registration of [stillborn] deaths is the accumulation of data.”<sup>39</sup> In 1926, after decades of dispute, stillbirth registration became compulsory in England and Wales, Scotland followed in 1938,<sup>40</sup> and by the mid- 20<sup>th</sup> century, stillbirths had been included among other vital statistics in the

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<sup>36</sup> Gayle Davis, *Stillbirth Registration and Perceptions of Infant Death, 1900-1960: The Scottish Case in National Context*, 62 *ECONOMIC HISTORY REV.* 629, 638 (2009).

<sup>37</sup> Even when stillbirth registration was required, concerns over the resulting burial costs meant that poorer parents often did not register the stillbirth. Lee W. Thomas, *A Model Reporting Law for Reporting Stillbirth*, 7 *AM. J. PUB. HEALTH* 46, 52 (1917). (“The expense of proper disposal of the remains of stillbirths is a hardship which comes at a time when the family purse has already been greatly taxed, and this may also be partly responsible for the neglect of parents and doctor to register the stillbirth.”)

<sup>38</sup> Higgs, in *Construction of Categories* at 92. .

<sup>39</sup> Thomas at xx.

<sup>40</sup> From Gayle Davis.

United States.<sup>41</sup> As historian Gayle Davis has stated, stillbirth registration at long last, “created social, statistical, and medical recognition of the [stillborn] infant as a separate and important entity.”<sup>42</sup> The collection of detailed data on stillbirths remains an important public health goal, both in developing nations where record keeping is often scant, and in developed states where there is concern over correlations between stillbirth and maternal obesity (with its connection to poverty) and over on-going disparities in the incidence of stillbirth and maternal race.<sup>43</sup>

### MISSING ANGEL ACTS

Recently, however, a new demand has been made on law’s authority. The parents of stillborn babies in the U.S. have argued that a fetal death certificate—the only form of documentation that has traditionally accompanied stillbirth—fails to capture the nature of their experience and is an inaccurate, indeed an offensive, bureaucratic response to their circumstances and suffering. The movement developed under the leadership of Joanne Cacciatore, an Arizona mother who started a local support group, Mother in Sympathy and Support or M.I.S.S. for short, following the devastating stillbirth of her daughter in 1993.<sup>44</sup> Cacciatore’s personal grief was compounded by Arizona’s dispiriting bureaucratic response. After receiving a fetal death certificate in the mail, Cacciatore called the official registry to request her daughter’s birth certificate, only to be told that

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<sup>41</sup> S. Shapiro, *Development of Birth Registration and Birth Statistic in the United States*, 4 Population Studies 86, 86 (1950). 1915 Wood book on US for summary of state laws.

<sup>42</sup> Davis, at 630.

<sup>43</sup> Willinger, M., Ko, C.W., Reddy, U.M., *Racial Disparities in Stillbirth Risk Across Gestation in the United States*, 201 AM J OBSTET GYNECOL 469, e.1-8 (2009).

<sup>44</sup> M.I.S.S. Foundation, *available at* <http://www.missingangelsbill.org/>.

she “hadn’t had a baby; she had had a fetus” and couldn’t get a birth certificate.<sup>45</sup>

“Channeling her grief and fury into action,” Cacciatore then set out to change the law regarding stillbirth registration in Arizona.

Thus, while M.I.S.S. continues to provide emotional support for bereaved parents, following Cacciatore’s success in Arizona, it has also developed a sophisticated legislative branch, the M.I.S.S. Foundation, to assist parents in other states to lobby state governments to enact Missing Angel Acts.<sup>46</sup> To this end, the M.I.S.S. Foundation offers parents media packs, suggestions for “Meeting with your Legislators,” sample letters and testimony, talking points on how to frame the issue with local legislators, and tips on how to move a bill through to passage.<sup>47</sup> Across the country, newspaper headlines captured the successful nature of the campaign: “*Out of Grief Grows Desire for Birth Certificates for Stillborn Babies*”; “*Acknowledging Angels: Fight for Stillbirth Certificates*”; “*Parents of Stillborn Babies Push For Recognition*.”<sup>48</sup>

The advocacy is powerful, entwining the authority of parental pain ---“I just want to acknowledge that Emma [or Cheyanne or Alyssa or Hunter or Brady] existed.”<sup>49</sup> This, coupled with the familiar and noble appeals to law, “We are the voices of the children

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<sup>45</sup> Tamar Lewin, *Out of Grief Grows Desire for Birth Certificates for Stillborn Babies*, N.Y. TIMES, May 22, 2007. In addition to being the Chief Executive Office of the MISS Foundation, Cacciatore, now Cacciatore-Gerard, is now an assistant professor of Social Work at Arizona State University. Her personal bereavement blog is found at <http://drjoanne.blogspot.com/>.

<sup>46</sup> These laws authorize parents to request and the state to issue birth certificates for stillborn children. The certificates do not replace but are issued in addition to fetal death certificates, which remain compulsory. The birth certificates are not issued automatically, but only upon application by a parent. TAKEN FROM TEXT AT THIS POINT.

<sup>47</sup> M.I.S.S. Foundation, Missing Angels Bills Legislative Reference Site, *available at* <http://www.missingangelsbill.org/>.

<sup>48</sup> See Lewin, Tamar, *Out of Grief Grows Desire for Birth Certificate for Stillborn Babies*, N.Y. TIMES, May 22, 2007; see also Palleschi, Amanda, *Acknowledging Angels: Fight for Stillborn Certificates*, The (Harrisburg) Patriot-News, *available at* <http://www.centredaily.com/2010/03/27/1879095/acknowledging-angels.html>; see also Joffe-Walt, Chana, *Parents of Stillborn Babies Push for Recognition*, *available at* <http://www.npr.org/templates/story/story.php?storyId=7407248>.

<sup>49</sup> *Id.*

who cannot speak for themselves. We do it for them, in their honor and in their behalf. We will not stop until justice is done.”<sup>50</sup> The response by legislators is not surprising. As state senator Abel Maldonado, a bill sponsor in California, reported, “I wish you could’ve sat in on some of the meetings we had with these women. When they bring out their albums of pictures, with their hands holding their baby’s tiny hand—my Lord. It’s just hard.”

To some, the desire for a stillborn birth certificate may seem like playing with words. But as supporters in California explained during that state’s legislative process, “What seems to be semantics provides enormous benefits to the women suffering from the immeasurable guilt and feelings of failure.... [I]t seems cruel to offer a reminder of the death and not of the birth.”<sup>51</sup> Another mother put it more simply: “To everyone else it’s a piece of paper, but to us it’s gold.”<sup>52</sup> Thus the wording of the certificates matters greatly to supporters. For example, the M.I.S.S. Foundation has opposed (successfully in some states) legislation authorizing a ‘Certificate of Stillbirth’ in contrast to a ‘Certificate of Birth’, or a ‘Certificate of Birth Resulting in Stillbirth.’ The argument is that because the word ‘stillbirth’ connotes death, its inclusion defeats the purpose of the new document. A compromise was reached in California, where parents are now issued a ‘Certificate of Still Birth’ (two words). Statutory language has also mattered to those wary of Missing Angel legislation, and I discuss this below.

In state after state, Missing Angel legislation has received overwhelming support across party lines. As of 2010, twenty-seven states provide for some form of a stillborn

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<sup>50</sup> M.I.S.S. Foundation, Meeting with Legislators, (quotation from Cacciatore) *available at* [http://www.missingangelsbill.org/index.php?option=com\\_content&view=article&id=50&Itemid=55](http://www.missingangelsbill.org/index.php?option=com_content&view=article&id=50&Itemid=55)

<sup>51</sup> Assembly Committee Analysis of Bill AB 1929, 2002.

<sup>52</sup> Anya Sosteck, *A Precious Piece of Paper*, PITTSBURGH POST-GAZETTE, March 2, 2010.

birth certificate. Only one state governor, Bill Richardson of New Mexico, vetoed the legislation on the ground that it was “not sound policy.” Having two documents for a single event can lead to “confusion and potential fraud.”<sup>53</sup> Richardson’s 2007 veto was met head-on by Missing Angel proponents. Veto “Stuns Tens of Thousands of Bereaved Parents” announced one on-line headline.<sup>54</sup> A M.I.S.S. Foundation spokesman wrote that Richardson had “slapped grieving mothers and fathers in the face.”<sup>55</sup> Similarly direct about the political consequences of the veto, Cacciatore stated that Richardson, then a candidate for the Democratic presidential nomination, “had flippantly driven a stake through the heart of the legislation” and would lose the votes of “grieving parents across the country.”<sup>56</sup> Revised legislation is now before the New Mexico legislature.

### III. FETAL LIFE AND SOCIAL BIRTH

How has a child who has never taken a breath come to be understood as the proper subject of a birth certificate? Certainly the baby has ‘issued forth’ and so in a literal sense *has* been born or “delivered of its mother,” to use older phrasing. To be sure, birth certificates have traditionally signaled only *live* births. Yet for many parents, their stillborn child *has* been alive, a participating member of the family for most of the pregnancy and long before its birth.

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<sup>53</sup> New Mexico Senate Executive Message No. 80, 2007. A similar concern was raised a century ago within the medical community: “There are certain states and cities that report stillbirths, as both births and deaths. When we stop to consider that one of the most important functions of vital statistics is to furnish a source of study for the prevention of disease and death, can we possibly get the desired information to aid us in the prevention of stillbirths if we so register them?” Lee Thomas, *supra* note xx, at 50.

<sup>54</sup> M.I.S.S. Foundation Press Release, 2007.

<sup>55</sup> New Mexico Governor Bill Richardson Stuns Tens-of Thousands of Bereaved Parents and Vetoes the MISSING Angels Bill, *available at* <http://www.danielsstar.org/040707%20NM%20press%20release.html>

<sup>56</sup> *Id.*

This early engagement is due in great part to the common use and visual power of obstetric sonography. The technology has profoundly and permanently altered our relationship to the fetus.<sup>57</sup> Quickening, the physical sensation of fetal movement that formerly concretized pregnancy, now seems pokey and old fashioned as a statement of arrival: *of course* there's a baby in there, we saw it weeks ago! Pregnant women who undergo ultrasound perceive their baby as being “more real, more vivacious, more familiar, stronger, and more beautiful.”<sup>58</sup> Having an ultrasound is now understood as an aspect of prenatal care, and like other prenatal maternal behavior; the experience further solidifies the idea of a child.<sup>59</sup>

Ultrasound has made fetuses present in ways that once were possible only after the baby was born. The exuberant question once put to new parents in the past tense—“Was it a boy or a girl?”—is now asked early in pregnancy and in the present tense—“*Is* it a girl or a boy?” The identification of fetal sex often leads to the selection of a suitable gender appropriate name, which adds to the transformation of the pregnancy into a baby. Within months of conception then, the fetus not only has a sex, a name, and a face, but he or she now owns things, has prenatal preferences (organic food, Mozart, a smoke-free environment), its own page on Facebook and a registry at Bloomingdales. In short, social birth—the identification and incorporation of a child into its family during pregnancy—now commonly precedes biological birth.

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<sup>57</sup> Sanger, at 363-73.

<sup>58</sup> K. Dykes & K. Stjernqvist, *The Importance of Ultrasound to First-time Mothers' Thoughts About Their Unborn Child*, 19 J. REPROD. & INFANT PSYCHOL. 95 (2001).

<sup>59</sup> As anthropologist Linda Layne explains, for many pregnant women, “[e]ach cup of coffee or glass of wine abstained from...add[s] to the ‘realness’ of the baby within.” LINDA LAYNE, *MOTHERHOOD LOST: A FEMINIST ACCOUNT OF PREGNANCY LOSS IN AMERICA* 17 (2003).

The fact of social birth complicates any understanding of the stillbirth of *that* child, *that* member of the family. Its death in utero is not ‘intrauterine demise’ or ‘fetal wastage’ as stillbirth is defined and described in medical literature but rather, it is a death in the family. The stillborn baby was already known to his relatives; they had seen his image, and happily shown it to their friends and colleagues. This is all to say that the stillborn baby’s prenatal life survives his death. His name is no longer retrieved for re-use with a child who survives, a common enough practice in earlier times, but rather, the name is preserved for the stillborn child alone.<sup>60</sup> The baby is acknowledged and his death is mourned. In contrast to the awkward silence (and often the shame) that accompanied stillbirth even thirty years ago, stillbirth is no longer something to be endured privately but the fitting subject of shared sorrow and ceremony.

In response to this social reality, organizations such as M.I.S.S. and SHARE in the U.S. and the Stillbirth and Neonatal Death Charity (“SANDS”) in the U.K. offer a range of rituals and protocols to console parents and to guide medical professionals. The stillborn body no longer disappears, to be disposed of somehow or other. Rather, parents are asked if they want to spend time with their infant in order to hold and admire it, and to say farewell.<sup>61</sup> Hospitals increasingly provide ‘memory boxes’ in which mementos such as the baby’s blanket, footprints, scraps from fetal heartbeat monitors, and baby gifts

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<sup>61</sup> See Hughes P, Turton P, Hopper E, Evans CD., *Assessment of Guidelines for Good Practice in Psychosocial Care of Mothers after Stillbirth: A Cohort Study*, 360 LANCET 114-8 (2007) (concluding that parents who were urged to hold stillborn children were more depressed over time than those who didn’t). But see Rådestad I, Surkan PJ, Steineck G, Cnattingius S, Onelöv E, Dickman PW., *Long-term Outcomes for Mothers who Have or Have Not Held their Stillborn Baby*, 25 MIDWIFERY 422-9 (2009) (reporting a Swedish study in which mothers who held stillborn babies of at least 37 weeks gestation had better outcomes than those who did not).

can be placed.<sup>62</sup> Funerals are now common, and the industry offers special stillborn caskets and other paraphernalia such as stillborn lockets and picture frames. The technological manifestations of modern mourning—webcams at ceremonies, on-line guestbooks, and memorial websites—now attach to stillborn deaths as well.

In addition, postmortem photography, a tradition thought to have faded in the late 19<sup>th</sup> century, has reemerged.<sup>63</sup> The term refers to portrait-like photographs taken only after death in order to provide the living with a keepsake.<sup>64</sup> The practice began in the 1860s, when the likelihood of owning a photograph of a family member was far from certain. Photography was a relatively new medium and cameras were not commonly available. Families therefore reserved the commission of a portrait for special occasions, such as a wedding, an enlistment, or death.<sup>65</sup>

To modern ears, the practice may sound strange, even ghoulish. But if a bereaved relative was to have any visual remembrance of a loved one—particularly a child—a post-mortem photo was often the only chance.<sup>66</sup> Dead children were dressed up in their finest and posed often in life-like positions such as sitting on a chair or on their mother’s lap, or as peacefully asleep on a bed; dead infants were often photographed cradled in

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<sup>62</sup> Margaret Godel, *Images of Stillbirth: Memory, Mourning and Memorial*, 22 VISUAL STUDIES 253, 269 (2007).

<sup>63</sup> For example, a non-profit organization called Now I Lay Me Down to Sleep trains photographers to light, stage, and retouch photographs of stillborn babies. The organization defines stillbirth as death after at least 25 weeks gestation, so that the babies are quite developed and baby-like in appearance. See <http://www.nowilaymedowntosleep.org/home/>. See also Touching Souls: Healing with Bereavement Photography at <http://www.toddhochberg.com/about.html>. The fee at Touching Souls is \$750.

<sup>64</sup> See Jay Ruby, *Secure the Shadow*. Ruby explains that the bereaved were urged, in the words of an early photographic studio advertisement, to “Secure the Shadow, Ere the Substance Fades.”

<sup>65</sup> In addition, children were poor photographic subjects because the sitter had to remain still for several minutes while [whatever].

<sup>66</sup> Not only were children were unlikely to have had a sufficiently celebratory moment, but children were also poor photographic subjects. Sitters had to remain perfectly still for several minutes, often with their head held in place by a neck brace, in order for the plate to developed clearly. See RV Jenkins, *Technology and the Market: George Eastman and the Origins of Mass Amateur Photography*, 16 TECHNOLOGY AND CULTURE, 1-19 (1975).

their mother's arms.<sup>67</sup> Such pictures were treasured *momento mori*, as parents paid to have their child's image and their physical connection to the child captured and preserved.

As cameras and picture taking became more commonplace toward the end of the 19<sup>th</sup> century, the practice of formal post-mortem photography largely disappeared.<sup>68</sup> Parents were more likely to possess a picture taken during the child's life, and *this* became the treasured image in the event of death. In addition to technological advances, there were also cultural shifts in attitudes toward death. In the 19<sup>th</sup> century, death was a regular part of family life—people often died and were laid out at home. Displaying a photograph of one's deceased wife or child was a normal, respectful thing to do. Over time, however, as historian Jay Ruby has noted, death became a less polite subject of conversation.<sup>69</sup> Theories of good and bad mourning took hold, and concepts such as “closure” made clinging to the dead, particularly through a photograph taken after death, seem creepy, if not pathological. Post-mortem photography became a strange practice of the past, as taking, displaying, and cherishing pictures of the dead was increasingly regarded as unseemly rather than respectful. Post-mortem photograph became a strange practice of the past.

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<sup>67</sup> Collections of these poignant photographs are found in Jay Ruby, *Secure the Shadow: Death and Photography in American*; Stanley Burns, *Sleeping Beauty I: Memorial Photography in America*; and Stanley Burns, *Sleeping Beauty II: Grief, Bereavement in Memorial Photography American and European Traditions*. DATES

<sup>68</sup> To be sure, in some poorer communities, the practice continued well into the 1940s. The reknown Harlem studio photographer James Van Der Zee took elaborate commissioned photographs of dead babies often in the arms of parents. As Van Der Zee observed in a later interview regarding a portrait of a baby held by the father alone because the mother was still hospitalized, “If it wasn't for the picture, the mother wouldn't have seen the child for the last time.” JAMES VAN DER ZEE, *HARLEM BOOK OF THE DEAD* (1978) at 83.

<sup>69</sup> *Secure the Shadow* at p. 7. (noting that in the 19<sup>th</sup> century, death was “a common topic of polite conversation” and mourning “a normal part of the public life of most adults.”).

But this has now changed, at least with regard to stillborn infants. Cold clinical photographs taken as pathology specimens by morgue technicians following a stillbirth have been replaced by carefully lit and staged postmortem portraits taken by photographers sensitive to the baby's physical condition and the parents' distressed state.<sup>70</sup> As in 19<sup>th</sup> century photographs, the dead infant is also carefully dressed and posed, often in the arms of its parents, or next to its toys. And as in the 19<sup>th</sup> century, the photographs are also displayed, now not only on mantels or in private albums but on public websites devoted to the images.<sup>71</sup>

To be sure, not *all* parents want photographs. Elizabeth McCracken explains her husband's decision to decline a postmortem photograph of their stillborn son: "He was afraid we'd make a fetish of it, and he was right. The photo would not have been of our child, just his body."<sup>72</sup>

#### IV. STILLBORN BIRTH CERTIFICATES

In addition to the private artifacts and rituals that now surround stillbirth, the birth certificate itself is also now conceptualized as an artifact of mourning. The certificate has value in part because of its physicality. As McCracken explains: "A still born child is really only ever his death. He didn't live: that's how he's defined. Once he fades from memory, there's little evidence at all, nothing could turn up, for instance, at a

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<sup>71</sup> A photo catalogue of stillborn babies posted by their parents is found at <http://www.missingangel.org/main-angel.htm>. <http://www.missingangel.org/beautifulbabies.php>.

<sup>72</sup> McCracken, at xx. Linda Layne concedes that "baby things"—photos, gifts, and other objects saved after pregnancy loss—may indeed function as fetishes for bereaved parents. She suggests, however, society's traditional disregard of pregnancy loss has itself created the need for fetishization: "[I]f the 'realness' of their 'baby' and their loss were not disavowed in the first place, bereaved parents might not have such a need to use things in these ways." *Motherhood Lost* at 142.

[flea market] or be handed down through the family.”<sup>73</sup> The birth certificate provides such evidence. Like a lock of hair or a photograph, it can be touched, gazed upon, and handed down. The states are aware of the certificate’s presentation value. The Oregon statute identifies its certificate as a “Commemorative Certificate of Stillbirth” and mandates that it “shall be suitable for display and shall feature an attractive design with calligraphy-like font, high quality paper, [and] a State of Oregon seal...”<sup>74</sup> Parents may order multiple certificates, one for the baby book, another for the grandparents.

Perhaps more important, a birth certificate is also *official* and this is crucial to how it conveys meaning to parents. Why is this? When a baby is born alive, the issuance of a birth certificate is not particularly celebratory. It is the baby’s arrival, not documentation of arrival that matters. When the actual certificate arrives in the post, one hopes only that the parents file it away safely to be used as needed in the future, as proof of eligibility for school starting, for example. With a stillborn child, there will be no school starting. The certificate is perhaps the only connection between the state and the child available to the parents. It operates as a kind of objective proof that a particular child was born, and that his or her existence is not just a matter of familial memory but the subject of a *public* record as well. As Cacciatore has stated, “It’s dignity and validation. It’s the same reason why [people] want things like marriage licenses and baptismal certificates.”<sup>75</sup>

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<sup>73</sup> McCracken at xx.

<sup>74</sup> OR S432.266, 2006; *see also* Santa Clara County Pamphlet (providing that the certificate “will be issued on banknote security paper”).

<sup>75</sup> Lewin, N.Y. TIMES, *available at* <http://query.nytimes.com/gst/fullpage.html?res=9E07E0DC1F31F931A15756C0A9619C8B63>. To be sure, marriage licenses and baptismal certificates are *not* the same; the status created by one is public and legal; the second is private and religious.

Should the stillborn birth certificate be regarded as a harmless gesture of official generosity? Might it be viewed simply as the adaptation of a birth ritual that has little significance when a baby is born alive, but that becomes singularly important in the context of stillbirth? As one California mother mused, “The first day of school, prom, seeing her get married. She’ll never get those opportunities. I don’t get to see my daughter do that, so I want to get whatever I can, you know.”<sup>76</sup>

In a sense, the certificate is transformed from a somewhat ordinary ‘document of passage’ to what anthropologist Francoise Freedman has called a “ritual of misfortune.”<sup>77</sup> Or, however profound the parent’s loss, is there something fundamentally illogical or fictive about issuing a birth certificate to someone who has never lived? Is it a case of the law acting humanely in response to suffering, or is it more like the Wizard of Oz giving the scarecrow a diploma?<sup>78</sup>

Here it may be useful to consider the function of birth certificates more generally. Certainly they are of great practical importance for the individual, crucial to how one negotiates the administrative state. We produce our birth certificates throughout our lives to get a driver’s license, a passport, a ration book.<sup>79</sup> But in addition to their use in making claims upon the state, birth certificates have subjective significance for the person. They tell a great deal about who we are, at least according to certain traditional conceits, and so are constitutive of identity. They organize the facts that define how we hold ourselves out to the world: a public record of one’s parents, sex, name, race and

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<sup>76</sup> Parents of Stillborn Babies Push for Recognition, NPR All Things Considered.

<sup>77</sup> Freedman, F. B., *Changing Medical Birth Rights in Britain 1970-2010*, in BIRTH RIGHTS AND RITES Fatemeh Ebtehaj, Jonathan Herring, Martin Johnson, Martin Richards, eds. forthcoming, 2012)

<sup>78</sup> As readers have noted, it may be both: everyone *loves* the scarecrow and wants him to have the diploma.

<sup>79</sup> S. Shapiro, *supra* n. 4.1 In the United States, the importance of a birth certificate as a predicate for state benefits became particularly clear during the 1940s, for example to obtain a ration book for a new child, or to prove citizenship to obtain a defense industry job.

legitimacy. When a person wants to marry, for example, the birth certificate is evidence that one is the right age, the right sex, and in the days of anti-miscegenation laws, that one was the right race for the marriage to be contracted.

But how does any of this—the significance of a birth certificate for personal identity—apply in the case of a being who is not (and never was) alive? One possibility is that in the case of stillbirth, the certificate is not only a marker of the child’s status as a born person, but also of the parents’ status as mother and father. Certainly in the case of live births, birth certificates serve as important declarations of parentage. Just as modern postmortem photographs of mothers and fathers cradling their dead infant enable them literally to see and therefore to identify themselves as parents, the stillborn birth certificate similarly—and officially—confirms a parent-child relationship, however brief its span. The certificate fills in where even vocabulary fails. Unlike “widow” or “widower”—words that signal the end of a marriage by death—we have no word that captures or awards a status to the parent of a stillborn baby.<sup>80</sup>

A stillborn birth certificate may also honor not only parental status but also the *process* of birth. Proponents of New York’s Missing Angel Act emphasized, “stillborn mothers carry a fetus to term, endure the pain of delivery and produce mother’s milk, yet the state does not recognize them for having given birth.”<sup>81</sup> As one New York mother stated, “I was in labor. I pushed...and [I] deserved more than a death certificate.”<sup>82</sup> Not

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<sup>80</sup> In this regard, Jamie Abrams has suggested the evocative term “stillmother.” (conversation with CLS LLM 2011 Jamie Abrams). There has been an exception to mothers whose sons or daughters have died in combat: they are designated as Gold Star mothers, and their loss sometimes officially acknowledged. See John W. Graham, *THE GOLD STAR MOTHER PILGRIMAGES OF THE 1930S: OVERSEAS GRAVE VISITATION BY MOTHERS AND WIDOWS OF FALLEN WORLD WAR I SOLDIERS* (2005) (describing government sponsored trips to European cemeteries in France and England for the Gold Star Mothers of doughboys).

<sup>81</sup> New York Missing Angels Act, 2009.

<sup>82</sup> Lewin, *available at*

<http://query.nytimes.com/gst/fullpage.html?res=9E07E0DC1F31F931A15756C0A9619C8B63>.

only has the mother labored, but as many stillbirth mothers have remarked, they have experienced the physical aftermath of childbirth: fatigue, stretch marks, and so on.

But whether the stillborn birth certificate marks a process or a status, we see that its subject is not *only* the child but also the parent's relation to the child. The certificate is proof that a real child—real enough to have its birth recorded—was born to a woman now registered as its mother. This helps resolve the question often put to stillbirth mothers when they later have a second baby and are innocently asked by cheerful well-wishers, “Is this your first?”

## V. POSTHUMOUS CHANGES OF STATUS

Another way to think about stillborn birth certificates is as something like a posthumous change in the infant's status. The idea is that although the infant was born dead, by acknowledging the fact of birth (rather than the fact of live birth), the certificate elevates the stillbirth to the same status of the birth of a child born alive. Characterizing the certificate as an official form of posthumous recognition may clarify the nature of the benefit sought, the identity of the beneficiary, and what law's special intervention might be. I want therefore to consider *other* instances where the law confers a ceremonial status on someone after death.

One example is the posthumous award of citizenship to non-citizen soldiers killed under “conditions of hostility.”<sup>83</sup> In such cases, the next-of-kin applies on behalf of the soldier; if successful, they receive a certificate postdating the soldier's citizenship to the

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<sup>83</sup> Congress has declared that since 2001, *all* military service is under “conditions of hostility.”

time of death.<sup>84</sup> The original legislation made clear that citizenship acquired under these circumstances was expressly and solely “an honorary status commemorating the bravery and sacrifices of” veterans, and not meant to “convey any benefits under the Immigration and Nationality Act to any relative of the decedent.”<sup>85</sup>

Who benefits from the honorary status of posthumous citizenship? The soldier receives no tangible benefits, such as the right to be buried in a military cemetery: soldiers are entitled to that by virtue of their service alone. Still, the award of citizenship is not automatic; it must be applied for by the next of kin who by virtue of applying are understood to benefit. Posthumous citizenship would seem to recognize the sacrifice of the soldier *and* of the family in familiar patriotic terms and in the familiar form of an official certificate. The family may also find solace in achieving for their soldier what he or she had not accomplished in life.

The stillborn birth certificate hints at something like this, though here it is life itself that could not be achieved. In a sense, stillborn infants, like ‘greencard soldiers,’ have got close to the goal: they have made it to twenty or twenty-four weeks, and some to the very moment of full-term birth. In this sense, the birth certificate, like the certificate of citizenship, commemorates both promise and its tragic unfulfillment.

As I have noted, posthumous citizenship was initially a purely honorary status; kin were barred from receiving any derivative immigration or citizenship benefits for themselves.<sup>86</sup> In 2003, however, the law changed. In response to publicity involving non-citizen family members whose hopes for improved immigration status were dashed

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<sup>84</sup> U.S. Public Law 101-249, (1990), *available at* <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=0dc18d5032b5d010VgnVCM10000048f3d6a1RCRD>.

<sup>85</sup> *Id.*

<sup>86</sup> *Supra at.*

by virtue of their soldier's death in Iraq, Congress amended the law to provide for naturalization of surviving kin in certain cases.<sup>87</sup> Thus a posthumous status that was originally and emphatically symbolic has, over a short period of time, acquired more substantive content, and I will return to this point shortly.

Military promotion is another example of a posthumous change in status. Here too, surviving kin receive a certificate, and the higher rank can be inscribed on the gravestone. In this way the soldier's enhanced status produces visible, public recognition to be enjoyed by his family, and perhaps his unit. The soldier himself is not the direct beneficiary of the change in status; he or she is dead. Nonetheless, his *memory* is enhanced by the posthumous action.<sup>88</sup> On this account, the stillborn baby status (though not the baby himself) is benefitted by the posthumous action. Indeed, a stillborn birth certificate might also be viewed as a kind of promotion. It moves the baby from the status of a fetal death to the accomplishment of having been born, even if born dead. Even in the context of desolation, the certificate offers survivors a moment for celebration, however constrained it may be.

This celebratory potential is exemplified in the case of posthumous pardons and exonerations for wrongful criminal convictions. Consider the cases of criminal defendants exonerated by DNA evidence brought to light only after their deaths.

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<sup>87</sup> N-644. Application for Posthumous Citizenship, 2003.

<sup>88</sup> Here we might consider Thomas Nagel's notion of "posthumous harms," the idea that posthumous events may harm not only survivors, but also and more importantly the people who have died. THOMAS NAGEL, *MORTAL QUESTIONS* (1979). Under Nagel's "post mortem thesis," law can be used to help correct events following death that can be bad for us, such as leaving behind a poor widow, an illegitimate child or, in the case of stillbirth, not being considered as having ever lived. See THOMAS NAGEL, *MORTAL QUESTIONS*, chapter "Death" (1979). In contrast, under the "mortem thesis," defended by Epicurus, people who die cannot suffer from whatever happens after death. On this view, death leaves its victims immune from posthumous harms and the law has no business in trying to protect dead people's interests. Consequently, posthumous awards can only redress harms suffered by those who have survived, such as the surviving fiancé or the parents of a stillborn child.

Certainly the state may have an interest in correcting a particular injustice out of principled concern for the integrity of the legal system.<sup>89</sup> More often, however, the case is pressed by surviving family members who want to set the record straight.<sup>90</sup> In 2006, for example, the British government pardoned 300 soldiers shot for cowardice during the First World War, some of whom are now thought to have been suffering from shellshock.<sup>91</sup> As the grandchildren of one executed soldier explained, “We were determined for my mother’s sake because she always said ... he died fighting for his Country.”<sup>92</sup> The stillborn birth certificate may in spirit be most like a posthumous exoneration in that it seeks to offset a sort of cosmic injustice: the child’s death.

As these several examples show, posthumous changes in status appear to significantly benefit surviving relatives. On this account, providing birth certificates to the parents of stillborn infants seems an easy matter to resolve/uncomplicated. The infant itself cannot be harmed, its parents may benefit, and so why object? To use an economic conceit, no one is made worse off and the parents are better off—a Pareto improvement. This may, however, be too quick and too comforting a conclusion. Before concluding on something like humanitarian grounds that an infant who is born dead should be treated in

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<sup>89</sup> "Injustice Anywhere is a Threat to Justice Everywhere:" Lt. Henry O. Flipper Receives the First Posthumous Presidential Pardon in U.S. History, available at <http://www.arnoldporter.com/publications.cfm?action=view&id=263> (last checked November 28, 2010); see also Darryl W. Jackson, Jeffrey H. Smith, Edward H. Sisson, and Helene T. Krasnoff, *Bending Toward Justice: The Posthumous Pardon of Lieutenant Henry Ossian Flipper*, 74 IND. L.J. 1250 (1999) (BRIEF IN SUPPORT OF PETITIONER’S APPLICATION FOR PARDON). Although the dead (in contrast the their memory) cannot in fact benefit, pardons have been in terms of benefit to the deceased: “This good man has now completely recovered his good name.” See *Ex parte Grossman*, 267 U.S. 87, 120 (1925) (“Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law.”).

<sup>90</sup> Robert Mackey, *Texas Mother ‘Ecstatic’ About Posthumous Pardon for Wrongfully Convicted Son*, N.Y. Times blog, March 2, 2010, available at <http://thelede.blogs.nytimes.com/2010/03/02/texas-mother-ecstatic-about-posthumous-pardon-for-wrongfully-convicted-son/?hp> (“I just know that Tim is up there smiling,” said his mother).

<sup>91</sup> BBC News, 2006.

<sup>92</sup> Mackey, 2010

law—even ceremonially—like an infant who was born alive, it is worth considering whether there are other concerns to take into account.

## VI. CONCERNS

### **The Logic of the Thing: The Birth Certificate as Legal Fiction**

There may be a sense of uneasiness upon first hearing about birth certificates for children who have never lived. For many, there is something inherently illogical about the proposition. Birth certificates have traditionally, and uncontroversially, signified a live birth. Of course, one could argue that the word birth on a birth certificate does not have to mean live birth. Certainly a stillborn baby has “issued forth;” and so in a sense was *born*.<sup>93</sup> This is the parental argument: “I held her, I touched her, I gave birth to a child, and because she didn’t take one breathe outside my womb, they don’t consider her a baby.”<sup>94</sup> Still, the concern here is a birth certificate’s subjective meaning to parents—the intensity of their desire is immediately granted. The law’s concern is with the meaning of words in relation to the integrity of a legal document. The certificate is the official record of when and where a person is born and to whom. We might find it unsettling, for example, if parents could petition to change the actual date of a child’s birth to one more meaningful to the family.

Or is this insistence on accuracy being a bit too fastidious? As things stand now, other inventions on birth certificates are tolerated. Consider, for example, the practice of

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<sup>93</sup> Recall also that Queen Victoria of Spain “was *delivered* of a stillborn son,” a common historical formulation for the process of birthing, though I think we would not call her son a “newborn.”

<sup>94</sup> Veronica Torrejon, *Advocates Fight to Get Birth Certificates for Stillborn Babies in Pennsylvania*, THE MORNING CALL, (March 29, 2010), available at [http://articles.mcall.com/2010-03-29/news/all-quote.7220711mar29\\_1\\_birth-certificates-stillborn-planned-parenthood](http://articles.mcall.com/2010-03-29/news/all-quote.7220711mar29_1_birth-certificates-stillborn-planned-parenthood).

issuing a new birth certificate following a child's adoption.<sup>95</sup> In traditional closed adoptions, the name of the adoptive mother was substituted in for that of the birth mother, and a new birth certificate issued. The original certificate is then sealed and the new one, with its intentionally inaccurate information about who was the child's mother on the day of birth, accompanies the child through life. The practice developed in the mid-20<sup>th</sup> century in order to protect the reputation of unwed mothers at a time when illegitimate birth was highly stigmatized.<sup>96</sup> Clean start' birth certificates were also thought to normalize the adoptive family by helping it mimic the biological family. By treating the adoption just like a birth, the new certificate kept the fact of adoption a secret not only in the public record, and made it possible to do so in the community and in the family as well.<sup>97</sup> In short, to further prevailing theories about child development and family well-being in mid-20<sup>th</sup> century America, the law tolerated—indeed, insisted upon—certain fictions on the official second birth certificate.

More recently, the law has authorized the amendment of birth certificates to record a different sort of change in personal identity: a person's sex.<sup>98</sup> Indeed, in a few American states, a new certificate is issued so that the sex change is recorded back to the date of birth.<sup>99</sup> It is this "reverting back" that creates a fiction, at least in cases where a

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<sup>95</sup> See, e.g., *Adar v. Smith*, 597 F.3d 697 (C.A.5. La., 2010).

<sup>96</sup> E. WAYNE CARP, *FAMILY MATTERS: SECRECY AND DISCLOSURE IN THE HISTORY OF ADOPTION* (1998).

<sup>97</sup> JUDITH S. MODELL, *A SEALED AND SECRET KINSHIP: THE CULTURE OF POLICIES AND PRACTICES IN AMERICAN ADOPTION* (2002).

<sup>98</sup> See, e.g., *Somers v. Superior Court*, 92 Cal.Rptr.3d 116 (Cal.App.1.Dist., 2009) (allowing for the issuance of a new California birth certificate to reflect the gender reassignment of a nonresident born in California).

<sup>99</sup> See, e.g., Hawaii Statute; Stephanie Markowitz, *Change of Sex Designation on Transsexuals' Birth Certificates: Public Policy and Equal Protection*, 14 *CARDOZO J.L. & GENDER* 705, fn. 87 (2007). See generally, Dean Spade, *Documenting Gender: Incoherence and Rulemaking*, 59 *HASTINGS L.J.* 731 (2008) The UK Gender Recognition Act approaches the problem differently in that there is no requirement of surgical change, as is the case generally in the U.S. with regard to amending one's birth certificate on account of a sex re-identification. Rather, in the U.K., a certificate of gender recognition can be obtained on evidence that the person has lived for two years in his or her preferred gender.

person's sex has been changed rather than misidentified. The amended certificate does not reflect the person's status at birth. On the other hand, the amended certificate recognizes the social significance of a birth certificate. The person is entitled by virtue of the new certificate to align one's history with the present. The document is something like a passport for life; it tells the world who the law says you may rightfully represent yourself as being—your particulars—so in this regard the amendments are not fictional, but accurate.

States permit the amendment of birth certificates with regard to other changes considered by some as fundamental to one's identity, with differing requirements of proof depending on the nature of the change.<sup>100</sup> These include changes in one's name, legitimacy status, and race or ethnicity.<sup>101</sup> In addition, some states, such as Hawaii, permit amending a birth certificate to reflect "a legal determination of the *nonexistence* of a parent and child relationship" for a person identified as a parent on the certificate.<sup>102</sup> Such provisions deal primarily with cases where paternity has been legally established in a man not designated as the father designated on the original birth certificate.<sup>103</sup> As in the case of adoption, the nature of this change involves not only an identifying feature about the person but about her relation to another. This is therefore especially illuminating in the context of stillbirth, where a core parental claim is that the certificate publically affirms a *relationship*. The argument is not that their child was born alive (a fiction) but

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<sup>100</sup> See, e.g., the state of New Jersey's instructions for Correcting a Vital Record <http://www.state.nj.us/health/vital/amend.shtml#gen>. New Jersey categorizes corrections to birth certificates as ancillary, non-ancillary items and typographical errors.

<sup>101</sup> See, e.g., *Toledano v. Drake*, 161 So2d 339 (La.App.4.Cir., 1964) (ordering a change in birth records to reflect that the plaintiff was white rather than "colored.").

<sup>102</sup> State of Hawai'i, Dept. of Health, available at <http://hawaii.gov/health/vital-records/vital-records/newbirthcert.html>.

<sup>103</sup> See, e.g., in California, Sonoma County Public Health Division, Office of Vital Statistics, Adding a Father to a Birth Record (Acknowledgment of Paternity) pdf, available at <http://www.sonoma-county.org/health/ph/vitalstatistics/birth.htm>.

rather that they are the parents of a baby who was born and who they regard as dear a child as if she had been born alive (a social reality).

The law has on occasion acknowledged the existence of a prenatal social relationship in determining aspects of stillborn's legal status. I have in mind an interesting case from the European Court of Human Rights. In 2001, a Russian mother, Natalya Znamenskaya, sought to establish the paternity of her stillborn baby so that the correct patronymic could be inscribed on the infant's tombstone. (Because the mother was married at the time of conception, her legal husband and not the baby's biological father was presumed to be the father.) The Russian court rejected Znamenskaya's petition on the grounds that the statute establishing paternity applied only to children who were born alive. Znamenskaya then brought an action before the European Court of Human Rights, arguing that Russia's refusal to establish her child's proper paternity violated Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Article 8 provides that "Everyone has the right to respect for his private and family life." The Court agreed, noting that because "the applicant must have developed a strong bond with the embryo whom she has almost brought to full term and that she expressed the desire to give him a name and bury him, the establishment of his descent undoubtedly affected her 'private life'." Under these circumstances, to allow "a legal presumption ... to prevail over biological and social reality, without regard to both established facts and the wishes of those concerned and without actually benefiting anyone, is not compatible ... with the [state's] obligation to secure ... effective respect for the respect owed under Article 8."<sup>104</sup> In the Znameskaya case, the Court granted the mother's request in part because to do otherwise benefitted no one. I take up the

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<sup>104</sup> *Id.*

question of whether stillborn birth certificates are similarly harmless in the section on abortion regulation below. *Znameskaya* alerts us to the necessity of considering social reality is a fuller and less immediate context.

And there may be other limits on the law's complicity or engagement with social realities. I offer two easy examples, as a way of locating uncontroversial boundaries between private and public recognition of cherished relationships. The Church of Jesus Christ of Latter Day Saints provides a ceremony for the re-marriage of deceased persons to one another.<sup>105</sup> While this form of marriage, like posthumous baptism, may satisfy the spiritual dictates of believers, I suspect there would be serious hesitation to have *states* issue marriage licenses in such cases, to be recorded among other vital statistics, were such a request made (it hasn't been). Similarly, parents have been known to disinherit children who, among other failings, marry outside the family faith. The refrain is often something like "he is no longer a son of mine." Yet while the law will uphold the parent's devise, but it would not issue the parent a death certificate for their child, however dead to them their child might be. Again we see that with few exceptions, the law refuses the use of marriage and death certificates for expressive purposes.<sup>106</sup>

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<sup>105</sup> <http://www.lds-mormon.com/veilworker/marriage.shtml>

<sup>106</sup> There is the case of statutory posthumous marriage from France. In 1959, in response to a tragic dam disaster, President deGaulle authorizes posthumous marriages, or "mariage posthume," in cases where there was unequivocal proof that the dead person had intended to marry his or her fiancé. Article 171 of the Code Civil, *available at* [http://www.legifrance.gouv.fr/affichCodeArticle.do;jsessionid=0CE10EB44ED203D8728C03A1F596DBC B.tpdjo09v\\_1?idArticle=LEGIARTI000006422218&cidTexte=LEGITEXT000006070721&dateTexte=20090421](http://www.legifrance.gouv.fr/affichCodeArticle.do;jsessionid=0CE10EB44ED203D8728C03A1F596DBC B.tpdjo09v_1?idArticle=LEGIARTI000006422218&cidTexte=LEGITEXT000006070721&dateTexte=20090421). The law extended the tradition of proxy marriages that had developed in the First World War. (Loi. N° 59/1583 du 31/12/1959). In a marriage postumethe new spouse receives no inheritance rights, but the marriage legitimates the couple's children. Here several sorts of benefits accrue posthumously: the emotional satisfaction of having been married, the (perhaps) enhanced social status to the widow or widower, and the benefits of legitimacy to any children. Thus the marriage is not only expressive.

## The Therapeutic Use of Law

The term ‘therapeutic jurisprudence’ refers to the proposition that official interactions with law can benefit people psychologically. The concept developed in the context of involuntary civil commitments hearings, where it was argued that respectful treatment of the mentally ill was not only a matter of procedural fairness but had therapeutic value as well.<sup>107</sup>

The movement for stillborn birth certificates is similarly premised on the proposition that law has therapeutic potential and can soothe the emotional needs of distressed constituencies.<sup>108</sup> The goal of Missing Angel Acts is to alleviate the unfathomable pain of the parents of a stillborn baby. In a sense, the birth certificate offers a form of administrative solace. As the legislative sponsor of the California Missing Angels Bill stated, the certificate “is a hug from California to grieving mothers.”<sup>109</sup>

Are there other instances where legislatures have responded to demands that legislation attend to the *emotional* needs of the polity? One American example is victim impact evidence in capital trials. These are presentations in court by the bereft families of murder victims in which family members testify about how special the victim was and how much he or she meant to them. In 1991, the Supreme Court held that victim impact evidence in capital murder cases, even before sentencing, was not prejudicial to the

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<sup>107</sup> DAVID B. WEXLER & BRUCE J. WINNICK, *ESSAYS IN THERAPEUTIC JURISPRUDENCE* (1991).

<sup>108</sup> It is useful to distinguish the concept of therapeutic jurisprudence from monetary compensation for pain and suffering, including the pain and suffering of bereavement. The tort system remains in place to award damages to parents for stillbirths caused by medical or other forms of negligence. **ADD ONE or TWO CASES.** In such cases, someone has been at fault. Missing Angel Acts proceed independent of the cause of the stillbirth. They are aimed at a difference aspect of grief: not its monetary value, but rather its assuagement through what might be characterized as an expressive use of law. As one stillbirth mother put it, the birth certificate operates as a “a sort of terrible consolation prize.”

<sup>109</sup> *Payne v Tennessee*, 501 U.S. 808 (1991).

defendant, but rather, could help the jury assess his moral culpability.<sup>110</sup> While victim impact evidence has traditionally consisted of oral statements, some courts now permit victim impact *videos* that offer a photo montage of the victim's life, sometimes set to music, much like the video tributes played at weddings or funerals.<sup>111</sup>

Victims' rights groups have argued that addressing the court is necessary for them to achieve 'closure.' And it may be that some surviving relatives will feel better if in the very halls of justice they can tell the defendant to his face what the personal costs of the crime have been for them. But as Susan Bandes has pointed out, not all relatives choose to make statements, or to make vengeful statements: some find closure in silence or in forgiveness.<sup>112</sup> Because of the inherent complexity of the category of 'emotional needs,' it may be that law should proceed cautiously in such areas. In the case of victim impact evidence, Bandes argues that it is important at least to try to "untangle what one's religion might urge, from what psychiatry might try to achieve, from what politics might dictate, and all of those from what the law can, should, or even attempt to accomplish."<sup>113</sup>

Should there be constraints on law's compassionate instincts when law-makers are pressed by grieving parents?<sup>114</sup> One issue concerns the *scope* of compassion. At

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<sup>110</sup> *Id.*

<sup>111</sup> Christine M. Kennedy, *Victim Impact Videos: The New Wave of Evidence in Capital Sentencing Hearings*, 26 QUINNIPIAC LAW REV. 1029 (2008).

<sup>112</sup> Susan Bandes, *When Victims Seek Closure: Forgiveness, Vengeance and the Role of Government*, 27 FORDHAM URBAN L. J. 1599, 1601-02 (2000).

<sup>113</sup> *Id.*

<sup>114</sup> We might want to distinguish legal responses to grieving from other forms of emotional distress, where in certain instances, the law has withdrawn mechanisms of redress. I have in mind the abolition of causes of action for wounded feelings occasioned by the break-up of a romantic relationship. Once vibrant, by the mid twentieth century, suits for breach of promise to marry or seduction were abolished by "anti-heartbalm statutes." See Nathan P. Feinsinger, *Legislative Attack on "Heart Balm,"* 33 MICH. L. REV. 979, 986-96 (1935); see also MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 33-38 (1985); SASKIA LETTAMAIER, BROKEN PROMISES: THE ACTION FOR BREACH OF PROMISE OF MARRIAGE AND THE FEMININE IDEAL, 1800-1940 (2010); Lea VanderVelde, *The Legal Ways of Seduction*, 48 STAN. L. REV. 817 (1996). One reason for the abolition was that discerning fault in the

present US birth certificate legislation is limited only to stillbirths (fetal death after 20 weeks). But many women experience grief following a miscarriage (pregnancy loss before 20 weeks) and some engage in mourning rituals similar to those that accompany stillbirth: naming the child, cherishing its possessions, and giving a place of honor to sonograms taken earlier in pregnancy.

Because responses to miscarriage may not be qualitatively different from response to stillbirth, should birth certificates be issued here too?<sup>115</sup> There is already some suggestion of this kind of expansion. The Santa Clara County brochure asks among its FAQs, “If I had a miscarriage (less than 20 weeks gestation) what are my options?”<sup>116</sup> The answer provided is simple and striking: “The disposition of a fetus of less than 20 weeks does not require a fetal death/stillbirth certificate.”<sup>117</sup> But will a certificate be issued if the parents apply for one in the case of miscarriage? Indeed, some couples undergoing in vitro fertilization now express a preference for ‘disposal ceremonies’ when thawing and discarding unused frozen embryos.<sup>118</sup> Should the law recognize or in some way certify the existence of these earlier forms of prenatal life?

Here I want to reintroduce the distinction between private mourning and legal recognition of that mourning, or what might be characterized as the distinction between rites and rights. Some couples may want to bury their embryos, or to have them blessed,

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break-up of a romantic relationship was not really possible; in addition, women who brought such causes of action came to be regarded over time as gold-diggers rather than helpless victims.

<sup>115</sup> The question of how late miscarriages should be treated with regard to burial, for example, has also arisen in Australia; see Anne Barker, *Couple Demands Hospital Miscarriage Policy Changes*, (June 14, 2007), available at <http://www.abc.net.au/pm/content/2007/s1951683.htm>. (17 week miscarried fetus given to parents in a plastic container to take home).

<sup>116</sup> CITATION NEEDED.

<sup>117</sup> *Id.*

<sup>118</sup> Anne Drapkin Lyerly et al., *Fertility Patients’ Views about Frozen Embryo Disposition: Results of a Multi-institutional U.S. Survey*, 93 FERTILITY AND STERILITY, January 15, 2010; see also Denise Grady, *Parents Torn Over Fate of Frozen Embryos*, N.Y. TIMES, December 4, 2008 (describing how some IVF couples choose to have unused embryos “placed in the woman’s body at a time in her cycle when she would probably not become pregnant, so that they would die naturally.”)

or to otherwise commemorate lives that did not come into being.<sup>119</sup> Different cultures offer still other rituals; certain Japanese sects, for example, provide shrine gardens where small effigies representing the soul of a stillborn, miscarried or aborted fetus can be placed and honored.<sup>120</sup>

All these practices offer solace to those who have suffered a stillbirth or pregnancy loss. Yet they remain *private* rites and *private* responses. It is the demand that *law* participate in these practices that causes uneasiness, in part because a delicate line has been crossed regarding official complicity with private feelings, spiritual needs, and personal rituals. We see this in the simple matter of vocabulary: what are angels doing in the title of public legislation? Certainly one understands the many levels of comfort angel imagery may provide to grieving parents. As Layne found in her study of stillborn parent support groups, the angel-infant locates the infant in heaven, perhaps being cared for by other relatives; it suggests an eventual reunion in heaven; and, in a kind of inverted form of nurturance, it continues the family relationship as the angel now watches over its parents.<sup>121</sup> Angels also suggest “an on-going life that is taking place elsewhere” so that the stillborn child’s absence “is not the absence of non-existence but the absence of non-presence.”<sup>122</sup> Finally, there is also the consoling conceit, found also among poor mothers in Brazilian shantytowns, that God specially needed *this* infant and

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<sup>119</sup> For example, the Jewish rite of male circumcision, normally “an intimate and reinvigorating view of life’s beginning,” is permitted for a newborn who dies shortly after birth. See Mark S. Litwin, *A Young Life Passes, and a Ritual of Birth Begins*, NEW YORK TIMES, January 24, 2011. As the physician/mohel who performed a posthumous circumcision poignantly explained, “This was [the parents’] only unsullied moment with [their son], all they might remember. With no life ahead to pin dreams on, [the infant] had paused for one intense and ephemeral instant before being wrapped in the ancient tradition of his ancestors.”

<sup>120</sup> HELEN HARDACRE, *MARKETING THE MENACING FETUS IN JAPAN* (2007).

<sup>121</sup> Linda Layne, *Of Fetuses and Angels: Fragmentation and Integration in Narratives of Pregnancy Loss*, 9 KNOWLEDGE AND SOCIETY 29, 42-46 (1992).

<sup>122</sup> Helen Keane, *Foetal Personhood and Representation of the Absent Child in Pregnancy Loss Memorialization*, 10 FEMINIST THEORY 153, 160 (2009).

called it back, so that the death becomes part of a larger heavenly scheme.<sup>123</sup> It is not hard to appreciate the comfort provided by this sort of religious or spiritual imagery, yet states might pause before inscribing angels in law under a constitutional structure that separates civic from religious sentiment.<sup>124</sup>

There is also the question of law's competence to provide solace in these circumstances. As a state representative who voted against California's first iteration of Missing Angels Legislation explained, "While [my] heart went out to anyone who lost a child to stillbirth, you can't really vote legislation for grief and closure."<sup>125</sup> It is the "really" that may matter here. Missing Angel supporters believe that legislators *can* vote for closure. As the National Stillborn Society explains on its website, to deny a woman a stillborn birth certificate "is to tell her she is a failure. It is an open wound upon her soul that will never heal unless and until her sacrifice is recognized; just as live birth mothers

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<sup>123</sup> Layne at 43 ("How exactly this life fits into God's 'special plan' is usually left unexamined, simply taken on faith."). See also Nancy Scheper Hughes, *DEATH WITHOUT WEeping: THE VIOLENCE OF EVERYDAY LIFE IN BRAZIL* 416 (1998) (discussing the comfort to mothers "angel-babies"). [[[Stillborn support groups and merchandise that says "God must have needed an angel. websites]]]

<sup>124</sup> This is not to say that Missing Angel Acts are necessarily unconstitutional. Courts would be likely to hold that their primary purpose is not to advance religion but to provide solace to bereaved parents. Angels might also be looked upon, like "In God We Trust" on coins, or the Ten Commandments on courthouse walls, as having an conveying an essentially secular message. See, e.g., *Van Orden v. Perry*, 545 U.S. 677 (2005) (Ten Commandments merely acknowledge the role of religion in Nation's heritage). See Caroline Mala Corbin, *Ceremonial Deism and the Reasonable Religious Outsider*, 57 *UCLA L.REV.* 1545 (2010).

<sup>125</sup> Sara Cardine, *Helping Ease the Pain: New State Law Gives Grieving Parents a Record of their Stillborn Child's Birth*, *THE STOCKTON RECORD*, Feb. 8, 2008. Dana Delger has powerfully argued that the law is indeed incompetent to do what Missing Angel supporters want, and that is "to raise the dead." Dana Delger, *Pudding, Rocketship, Violence and the Word: Examining the Relationship between Stillbirth Birth Certificates and Abortion Through the Lens of Memoir* (unpublished paper on file with author). Historically, dead infants *were* raised from the dead. In certain regions of France, parents made pilgrimages to special special shrines where they would lay their dead infant on alter steps as people would gather round to watch for a sign of life, like a twitch or a breath. As soon as such movement was spotted, priests would baptize the child, who would then immediately die again, saved. See Jacqueline Simpson, *The Folklore of Infants Deaths: Burials, Ghosts, and Changelings*, in GILLIAN AVERY AND KIMBERLEY REYNOLDS (EDS), *REPRESENTATIONS OF CHILDHOOD DEATH* at 12.

are recognized.”<sup>126</sup> I do not challenge this assertion: consolation in grief would seem a deeply subjection and unassailable matter.<sup>127</sup> But it is important at least to raise the concern that satisfying the demand for this form of solace may have costs, not to those who may benefit directly from stillborn birth certificates, but for those who may be harmed indirectly. I take up the implications of Missing Angel Acts for one such category, women who seek abortions, in Part X.

### **Compulsory Reproductive Mourning**

In this section, I move from the influence of social practices on law to the influence of law on social practices. One concern is that as bereavement practices become officially entrenched, they take on a prescriptive quality, providing a template for how one is *supposed* to respond to death. Consider, for example, the description of stillbirth in a Santa Clara County pamphlet informing women about California’s Certificate of Still Birth: “This is not an early loss or abortion. Rather, this is a baby who

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<sup>126</sup> National Stillborn Society, Why We Need a Certificate of Still Birth, *available at* <http://www.stillnomore.org/main.htm>. Attaining closure for stillbirth is also used in marketing by malpractice attorneys. See Joseph Hernandez, Can Pursuing A Medical Malpractice Claims for Stillbirth of a Baby Bring Closure to Parent?, *available at* <http://www.articlesnatch.com/Article/Can-Pursuing-A-Medical-Malpractice-Claim-For-The-Stillbirth-Of-A-Baby-Bring-Closure-To-The-Parents-/893543> (“A monetary recovery can never make up for the loss families suffer under such circumstances but perhaps it can help them achieve a certain amount of closure.”)

<sup>127</sup> Two other issues arise with regard to law’s competence to provide solace. The first concerns the accuracy of the claim about what is at stake, what the law is meant to address. Missing Angel Acts are characterized as a legislative response to *grief*, yet parents of stillborn children may have *other* emotional responses, such as shame or anger or guilt that may in part motivate the desire for birth certificates. See Layne at Chapter 7, “True Gifts from God”: Paradoxes of Motherhood, Sacrifice, and Enrichment” at 146f (discussing the common phenomenon of guilt and self-blame by stillbirth mothers). Legislators must take care to value the characterization of need as asserted by their constituents, but law may be working above its job description in taking this therapeutic turn. **Citation to something on dysfunctional grief.** It is beyond my own competence to pronounce on how stillborn birth certificates might work in relation to other affective states, such as anger or guilt. I note simply that legal attempts to respond to emotional needs may be more complicated than first appears. The second point is simply this. It may be, as Dana Delger has powerfully argued, that the law is incompetent to do what Missing Angel supporters want most, and that is “to raise the dead.” REALLY LIKE TO GET THIS LAST POINT TO TEXT. Same as in last fn.

was born dead.”<sup>128</sup> Quoting from the M.I.S.S. Foundation, the publication then explains that the Certificate “extends much needed dignity and compassion to women who endure the death of the birth of their baby.”<sup>129</sup>

This information goes beyond informing women how to find the proper form or where to send their \$20 fee. The statements define stillbirth as a particular kind of event and suggest what suffering mothers of stillborn children need, or are supposed to need, and how they can get it. Other practices may push in this same direction, as when hospitals send patients letters of condolence or provide them with mourning materials or with referrals to support groups. Yet these are *private* gestures, not official ones, and that distinction—the place of law in all of this—remains crucial to the concerns expressed here.

This is not to suggest that parental grief following stillbirth is inauthentic. But one can be guided to expressions of grief and expectations of solace, just as one can be guided to expressions and expectations of vengeance and closure in the case of victim impact statements: this must be what a loving survivor does at trial because the law has provided for it. We are certainly familiar with the normative force of cultural practices with regard to non-legal procreative rites. Consider the parental display of sonograms. As one pregnant woman explained about showing her baby’s ultrasound to friends and co-workers, “I wouldn’t be a good mommy if I didn’t.”<sup>130</sup> But surely there is no single

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<sup>128</sup> Santa Clara County Public Health Department, 2008. The pamphlet explains further that the baby “could even be a post-term baby- who went to 42 gestational weeks and who might weigh more than ten lbs, but, who dies one minute prior to birth is considered “stillborn.”

<sup>129</sup> *Id.*

<sup>130</sup> Sallie Han, *Seeing the Baby in the Belly: Family and Kinship at the Ultrasound Scan*, in *THE CHANGING LANDSCAPE OF WORK AND FAMILY IN THE AMERICAN MIDDLE CLASS* (Elizabeth Rudd & Lara Descartes 2008). Indeed, as I discuss below, cultural practices regarding sonograms—their significance as proof of a real baby—contribute in the case of stillbirth both to the depth of parental grief and to

manner of good motherhood with regard to either pregnancy or to stillbirth. [[Many women regard a stillbirth at 20 or more weeks as the death of their precious baby. But it is worth considering whether the source for that characterization properly belongs to law.<sup>131</sup> ]]

Two final considerations regarding guided expressions of grief. Leslie Reagan has argued in the context of miscarriages, that while the emphasis on maternal grief may seem empathic and apolitical, the story is more complicated: “Public fixation on miscarriage as a personal tragedy rather than a public health problem .... deflects attention from ...inequities in health care, education, and income that produce particularly high infant-mortality rates among African Americans.”<sup>132</sup> Similar correlations appear in modern stillbirth statistics,<sup>133</sup> and perhaps public awareness of stillbirth through Missing Angel Acts will encourage research on its underlying causes. Indeed, the MISS Foundation has expanded its mission to include providing support for research and education on stillbirth.<sup>134</sup>

Lastly, Reagan argues further that legitimating a movement that demands sorrow in response to *involuntary* pregnancy loss reinforces the view that voluntarily

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assuaging/ameliorating it. LAST SENTENCE TO TEXT??? SEEMS IMPORTANT. YES I THINK SO HERE.

<sup>131</sup> To some extent, the law has already introduced the idea of grief as an inevitable consequence of pregnancy loss into the cultural mix, although it has done so in the context of intentional rather than involuntary pregnancy loss. In upholding Nebraska’s ban on late term abortions performed by intact D&E (dilation and extraction), the Supreme Court in *Carhardt v. Gonzalez* noted that “Respect for human life finds an ultimate expression in the bond of love the mother has for her child....The State has an interest in ensuring so grave a choice is well informed. It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.” 550 U.S. 124, 159 (2007).

<sup>132</sup> Leslie J. Reagan, *From Hazard to Blessing to Tragedy: Representations of Miscarriage in Twentieth-Century America*, 29 *FEMINIST STUDIES* 356, (Summer, 2003).

<sup>133</sup> I have article on racial stats in US stillbirths.

<sup>134</sup> M.I.S.S. Foundation, Prevention and Research, *available at* <http://www.missfoundation.org/family/research/prevention.html>.

terminations should be treated similarly. In the U.S., various legal mechanisms have been put into play to make sure pregnant women grasp this point. For example, a growing number of states require women seeking an abortion to undergo ultrasound and be offered a look at the image of their fetus before they can legally consent to the procedure.<sup>135</sup> Mandatory ultrasound is intended as a sort of ‘preview’ of grief, although there are almost no acceptable expressions of loss for the millions of women who decide to abort for the various reasons each year.<sup>136</sup> The contrast with the UK on this point— what counts as permissible grief-- is striking. In explaining the scope of their services to grieving parents, the SANDS guidelines explain:

Your baby may have been stillborn or died during or soon after birth. He or she might have spent some time in a special care baby unit. It may be that your baby died at an earlier gestation or that you had to make the difficult decision to end your pregnancy. We offer support whenever a baby dies.<sup>137</sup>

Under this protocol, feelings of maternal loss upon the death of a baby or fetus from *any* cause, including abortion, are recognized and accepted as a matter of social practice, rather than intensified and politicized as a matter of law.<sup>138</sup>

### **Demographic Integrity**

In 2007, New Mexico Governor Bill Richardson vetoed his state’s Missing Angel Legislation stating that “Having two documents for a single vital event can lead to

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<sup>135</sup> Sanger, Mandatory Ultrasound [whole thing! But use pages where legislation discussed?]

<sup>136</sup> Most recent Guttmacher Report on Why Women Abort [from Guttmacher Institute]

<sup>137</sup> Stillbirth and Neonatal Death Charity website, <http://www.uk-sands.org/About-Sands.html>

<sup>138</sup> One U.S. exception is A Heartbreaking Choice, an on-line support group for women who abort following a serious prenatal diagnosis. <http://www.aheartbreakingchoice.com/> (last visited Jan. 31, 2011).

confusion and potential fraud, and is not sound policy.”<sup>139</sup> A similar concern was raised by the American College of Obstetrics and Gynecology in response to a 2002 version of California’s Missing Angel legislation: “Requiring a new type of record which collects the same information required by a fetal death certificate ... creates more difficulty in attempting to accurately determine the number and causes of these kinds of fetal death.”<sup>140</sup> Such concerns about the integrity of public records are familiar. Recall the late 19<sup>th</sup> century argument that the absence of compulsory stillbirth registration compromised data collection and thwarted efforts to improve background social conditions.

To be sure, the registration of stillbirths has always been complicated in part because even the fact of a stillbirth was not always clear. To secure an infant’s salvation, baptisms were sometimes rushed so that a questionable birth was counted as a live one.<sup>141</sup> Medical evidence on when death occurred was often contested. Moreover, there has never been uniformity in what gestational period defines stillbirth.<sup>142</sup> This has been especially problematic in the United States where each state determines the definition of stillbirth. Most recently, the World Health Organization has created a new category called ‘perinatal death,’ to include deaths from twenty weeks gestation to one week after

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<sup>139</sup> New Mexico Senate Executive Message No. 80, 2007. A similar concern was raised a century ago within the medical community: “There are certain states and cities that report stillbirths, as both births and deaths. When we stop to consider that one of the most important functions of vital statistics is to furnish a source of study for the prevention of disease and death, can we possibly get the desired information to aid us in the prevention of stillbirths if we so register them?” Lee Thomas, *supra* note xx, at 50.

<sup>140</sup> AB 1929 Bill Analysis, 2002.

<sup>141</sup> Wood *in* CHILDREN REMEMBERED at 43 (noting that in 19<sup>th</sup> century France, “emergency baptisms” by midwives and doctors on fetuses in utero or during parturition may have led to the overcounting of live births).

<sup>142</sup> *See, e.g.*, Civil Status and Perinatal Death in ICCS Member States (1999) (comparing definitions among member states [I got this on line.]

birth.<sup>143</sup> From a public health perspective, this is troubling. As demographer Robert Woods explains,

When the distinction between fetal death and infant death is blurred, it will be difficult to ascertain the true level of mortality and, since the broad picture of morbidity is often judged via the absence of death, the health of a society, its improvement, and comparative position cannot be assessed with any certainty.<sup>144</sup>

Of course, even in Missing Angel Act states, stillbirths must also be recorded for purposes of vital statistics as fetal deaths, whatever other certificate the state may choose to issue. Perhaps then, there is little risk of statistical confusion. Stillborn children will not be mistaken for children who were born alive for administrative or actuarial purposes. Oregon, for example requires the number from the fetal death certificate to be included on the Commemorative Certificate of Stillbirth.<sup>145</sup>

Yet, as anthropologist Susan Greenhalgh has observed, “the process of making up persons often brings surprises, for the forms and politics of personhood that emerge may be quite different from those intended by the bureaucrats in the state.”<sup>146</sup> One such surprise, from China, may be useful in thinking about the consequences of official categories attached to birth. In the late 1970s, China instituted a “one-couple, one child policy” under which one child was encouraged, two strictly limited, and three “resolutely prohibited.”<sup>147</sup> Compliance was largely enforced in the cities but in rural areas, peasants resisted and had surplus children. These children now make up China’s “black

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<sup>143</sup> Silver, R. M., et. al., *Work-up of Stillbirth: A Review of the Evidence*, 196 AM. J. OF OBSTET. & GYN. 433, 434 (2007).

<sup>144</sup> ROBERT WOODS, DEATH BEFORE BIRTH: FETAL HEALTH AND MORTALITY IN HISTORICAL PERSPECTIVE 1 (2009).

<sup>145</sup> OREGON SAME CITATION.

<sup>146</sup> Susan Greenhalgh, *Making up China's 'Black Population' in CATEGORIES AND CONTEXTS: ANTHROPOLOGICAL AND HISTORICAL STUDIES IN CRITICAL DEMOGRAPHY* 148 (Szreter, S., Sholkamy, H., Dharmalingam, A., eds.).

<sup>147</sup> *Id.* at 160.

population,” a cohort of at least a million persons whose births were illegal and so were not registered with the state.<sup>148</sup> Demographically, the black population is “uncounted and unaccountable”;<sup>149</sup> practically, its members, because illegal persons, are entitled to no state services.<sup>150</sup> The two cases—the black population and Missing Angels—are uncanny mirror images of one another. The black population exists in fact but their births go unrecorded. In contrast, stillborn births are officially recorded but the babies themselves do not exist as living persons. Greenhalgh concludes that although some of demographic effects of China’s family planning program have been carefully studied, by taking the state’s classifications of persons as “givens,” population specialists “may have missed important categories of personhood that are rendered invisible by (even as they are simultaneously produced by) the state discourse.”<sup>151</sup>

As with the “black population,” it may be possible to miss the work that Missing Angel Acts do, not so much in terms of demographic accuracy but rather, how basic categories are established and defined in the first place, and how they acquire legal and social meaning. Compulsory registration of stillbirths in the early decades of the 20<sup>th</sup> century established stillborn infants “as a separate and important entity,” largely in the interest of public health.<sup>152</sup> Yet critical demographers now recognize “the immanence of change in the context and meaning of even the most basic categories.”<sup>153</sup> Stillborn birth certificates cannot help but influence how stillborn infants are understood, and what the

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<sup>148</sup> *Id.* at 165. Greenhalgh observes that although China’s one-family, one-child policy was “created to modernize the population, [it] has had the perverse effect of creating a substantial, albeit unenumerated, class of unplanned, distinctly unmodern” persons.”

<sup>149</sup> *Id.* at 165

<sup>150</sup> *Id.* at 165.

<sup>151</sup> *Id.* at 166.

<sup>152</sup> Gayle Davies, *supra*.

<sup>153</sup> Szerter et al., *Contextualizing Categories: Towards a Critical Reflexive Demography in Categories and Contexts*, in *Categories and Contexts: Anthropological and Historical Studies in Critical Demography*, (S. Szerter, H. Sholkamy and A. Dharmalingam, eds. 2004).

categories of birth, viable fetal life, and prenatal death mean. It is then time to turn to the relationship between Missing Angel Acts and other laws statutes that pertain to the life and death of unborn children.

### **Stillbirth and Abortion: Commemorating Life before Birth**

Might stillborn birth certificates have consequences for the subsequent regulation of abortion? Supporters of legal abortion have been concerned that issuing certificates to children who have never lived may serve, however unintentionally, as yet another legal marker equating fetal life with that of born persons and that this will, sooner or later, play its part in the recriminalization of abortion. The concern is that Missing Angel legislation, however compassionately conceived, deepens cultural familiarity with the idea of prenatal death as the loss of a *child*. The certificate demonstrates that the stillborn child is loved, mourned, and *should be recognized* in the same ways as any other child.

Wariness about stillborn birth certificates arises against the background of a comprehensive set of federal, state, and municipal laws aimed at regulating abortion out of existence.<sup>154</sup> Part of the strategy to make abortion hard to get and hard to choose has been to legally define fetuses and embryos as infants, children, persons and victims. Examples include the Unborn Victims of Violence Act, the Born-Alive Infants Protection Act, and federal regulations designating fetuses as children as the means of providing pregnant women with prenatal care. South Dakota requires doctors to inform patients

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<sup>154</sup> As one federal appellate judge put it, “[I]n many places, burdensome regulations have made abortions effectively unavailable, if not technically illegal. It is this type of regulation—micromanaging everything from elevator safety to countertop varnish to the location of the janitors’ closets—that is challenged in this case. *See Greenville Women’s Clinic v. Comm’r, S.C. Dep’t of Health & Env’tl. Control*, 317 F.3d 357, 3371-72 (4th Cir. 2002) (upholding various state abortion regulations) (dissenting, Judge Robert Bruce King)

that an abortion “will terminate the life of a whole, separate, unique, living human being (S.D.C.L. §32-23A-10.1, Section 7, 2005), and defines a “human being” as “an individual living member of the species *Homo sapiens*, including the unborn human being during the entire embryonic and fetal ages from fertilisation to full gestation.”<sup>155</sup> *Roe v. Wade* may have removed the language of homicide or murder as a matter of constitutional law, but the identification of all prenatal life as children is meant to come as close to that characterization as possible. It is a constant challenge to the premise of *Roe* that “the unborn have never been recognized in the law as persons in the whole sense.”<sup>156</sup>

With stillborn birth certificates, the rhetorical work is done not by equating the word ‘child’ or ‘person’ with ‘fetus’ but rather by focusing on the concept of birth. It is the fact of birth—issuing forth dead *or* alive—that elevates the stillborn child and compels his recognition in terms that are socially familiar. The power of the word ‘birth’ in the context of fetal death has already arisen in the case of abortion late in pregnancy—deliberately called ‘partial birth abortion’ in the U.S. and banned in 2004 by the Partial Birth Abortion Ban Act.<sup>157</sup>

The argument here is not that Missing Angel supporters are fronting for a pro-life agenda.<sup>158</sup> Indeed, the M.I.S.S. Foundation adamantly distances itself from the debate and recommends that when lobbying, supporters should not “use any language about ‘fetal rights’ or other vernacular which may stir up discussion....Our agenda is not one

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<sup>155</sup> *Planned Parenthood v Rounds*, 530 F.3d 724 (8th Cir. 2008).

<sup>156</sup> *Roe v. Wade*, 410 U.S. 113, 162 (1973).

<sup>157</sup> Public Law 108-105, 2003.

<sup>158</sup> When pro-life organizations such as the National Right to Life *want* to get involved in a legislation that may on first glance seem distant from the concerns of abortion, they know how to do so and are direct about taking appropriate credit. A good example is the passage nationwide a decade ago of “safe haven laws” designed to prevent incidents of “dumpster babies.”. See Carol Sanger, *Infant Safe Haven Laws: Legislating in the Culture of Life*, 106 COL. L.R. 753 (2006).

that challenges reproductive freedom.... We recommend that you do not state your personal opinion in any meeting and that you refrain from using any type of abortion rhetoric, either for or against, in your meetings and letters.”<sup>159</sup> Yet despite disclaimers by MISS lobbyists and vague statements of neutrality by Planned Parenthood,<sup>160</sup> it is not surprising there is tension between the two groups. Stillbirth parents want their child—a being who died before birth—acknowledged as a child. Those who support legal abortion necessarily resist that characterization, at least as a matter of law,

Thus however discrete the intended purpose, the concern has been that Missing Angel Acts might be used to thwart legal access to abortion. Some opponents have been concerned with the cultural message of the legislation—the implicit relationship between acknowledging birth and fetal personhood. Others had more practical concerns. For example, opponents to proposed legislation in California feared that the birth certificate could be used to require the reporting of legal abortions performed after 20 weeks gestation and therefore interfere with patient privacy.

State legislators have sought to disaggregate stillborn birth certificates from the on-going politics of abortion. As the sponsor of Rhode Island’s bill stated, “At this time, I’m asking both sides to stand down.”<sup>161</sup> As a substantive component of ‘standing down’, a number of drafting precautions have been taken to distinguish stillborn deaths from elective abortion in Missing Angel Acts. For example, most states specify that stillborn birth certificates can be issued only in cases of ‘unintended’, ‘spontaneous’, or

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<sup>159</sup> Missing Angel Bill Legislative Reference site. To be sure, there may be some link between pro-life sentiments and a history of reproductive difficulty. See Kristin Luker, ABORTION AND THE POLITICS OF MOTHERHOOD at 151 (reporting that one third of pro-life activists interviewed came to the issue after experiencing their own “problem of parenthood: an inability to conceive, a miscarriage, a newborn child lost to congenital disease or defect, an older child lost to childhood illness”).

<sup>160</sup> Letter from Gloria Feldt on MISS FOUNDATION website; characterized as ‘feminist support.’

<sup>161</sup> Steve Peoples, *At the Assembly – House Approves Issuing Birth Certificates for Stillborn Babies*, PROVIDENCE J. BULLETIN (2 May 2007).

‘naturally arising fetal demise.’ Many clarify that the certificate “shall not constitute proof of a live birth,”<sup>162</sup> and that it cannot be used “to secure any right, privilege, or benefit in this State.”<sup>163</sup> To address the concerns of past or potential abortion patients that the certificates could be used to “out” them, states have provided that parents alone and no one else may request a stillborn birth certificate. The concern regarding past abortions arose from the fact that in several states, stillborn birth certificates may be ordered for a stillbirth no matter whenever it occurred. Finally, in response to pro-choice concerns raised during the enactment process, New York replaced references to ‘child’ or ‘baby’ with the word ‘fetus’<sup>164</sup> and the California statute explicitly affirms women’s existing rights to reproductive privacy.<sup>165</sup> Such compromises are not without resistance from pro-life organizations. Two groups, the California Pro-Life Council and the Capitol Resource Center, withdrew their support for the California Missing Angel bill after the amendment recognizing women’s reproductive rights was added.<sup>166</sup> As a spokesman explained, the amendment “would affirm abortion on demand” and was “tantamount to an affirmation of *Roe v. Wade*.”

These provisions, working in concert, are meant to secure the recognition of stillborn babies sought by their parents without extending them legal personhood.

Nonetheless, once a category or status is established, it may take on a life of its own.

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<sup>162</sup> MO SB 799 §193.255, 2004.

<sup>163</sup> NV AB 68.

<sup>164</sup> NY A1731, 2009.

<sup>165</sup> CA SB 850, 2007. Such compromises are not without resistance from pro-life organizations. Two groups, the California Pro-Life Council and the Capitol Resource Center, withdrew their support for the California Missing Angel bill after the amendment recognizing women’s reproductive rights was added. A spokesman explained, the amendment “would affirm abortion on demand” and was “tantamount to an affirmation of *Roe v. Wade*.” 2007 WLNR 10521646 June 4, 2007, San Diego Tribune. Legislation on Stillbirths Entrangled in Abortion Fight. (“In the [Pro-Life Council] view, no pro-life lawmaker can, in good conscience, vote for this radical pro-abortion hijacking of an otherwise decent bill.”)

<sup>166</sup> 2007 WLNR 10521646 June 4, 2007, San Diego Tribune. Legislation on Stillbirths Entrangled in Abortion Fight. (“In the [Pro-Life Council] view, no pro-life lawmaker can, in good conscience, vote for this radical pro-abortion hijacking of an otherwise decent bill.”)

Legal status is a common, indeed, an important mechanism for the distribution of value and goods in a society, and over time more substantive benefits may attach to that status. In the case of posthumous citizenship, for example, citizenship later became a source of immigration benefits for kin in a kind of ‘rights creep’, as the meaning, use, and entitlements of status expand.

There has already been a gesture toward this kind of expansion in the context of stillbirth. Four Missing Angel states—Arizona, Alaska, Indiana and Missouri—have gone beyond issuing birth certificates and now provide parents with a dependent tax deduction in the year of the stillborn infant’s birth.<sup>167</sup> The sponsors of such legislation have explained that the deduction will provide parents with funds they might use toward funeral expenses and that this too might help to soften the blow they have sustained.

## VII. Conclusion

Stillbirth, like the death of other children within a family, is a deep, perhaps unfathomable loss. Elizabeth McCracken tells readers right from the start: “A child dies in this book: a baby. A baby is stillborn. You don’t have to tell me how sad that is. It happened to me and my husband, our baby, a son.”<sup>168</sup>

How families mourn their dead is a profoundly personal matter. Unlike past centuries, the death of a stillborn child is now understood as an event worthy of recognition. Hospitals and medical staff, religious and spiritual communities, families and support groups, the helping professions and even commercial enterprises now offer

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<sup>167</sup> MISSING ANGELS BILL (MAB) Legislation, State Chart, *available at* [http://www.missingangelsbill.org/index.php?option=com\\_content&view=article&id=76&Itemid=61](http://www.missingangelsbill.org/index.php?option=com_content&view=article&id=76&Itemid=61). In addition, the City Council of Wasilla, Alaska recently passed a resolution approving a one-time tax deduction for a state stillborns.

<sup>168</sup> McCracken at 16.

an array of bereavement rituals that seek to honor stillborn babies and their parents. The question I have posed in this Article is whether law should be added this list and whether stillborn birth certificates should become a mechanism of consolation.

Missing Angel Acts seek to expand the traditional significance of a birth certificate from marking a live birth to marking the birth of a viable infant who was born dead. In other countries, throughout much of Western Europe, for example, stillborn certificates, though not stillborn *birth* certificates, *are* issued, straightforwardly and without the contentious political concerns that now accompany any legislation in the United States having to do with fetal life or death. The issue is whether the law in the United States should facilitate this expansion or blurring of traditional markers between the two and how the costs of doing so should be measured.